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GUIDELINES AND SAMPLE CLAUSES TO INTERNATIONAL CONTRACTS FOR THE ACQUISITION, ASSEMBLY AND MANUFACTURE OF AGRICULTURAL MACHINERY AND SPARE PARTS THEREFOR *

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Preface

This document reflects the final stage of a process started at the First Consultation on the Agricultural Machinery Industry held in Stresa, Italy, from 15 to 19 October 1979. Recommendations related to contractual arrangements stated that UNIDO should:

"(x) prepare for the next Consultation model contracts to deal with import policies, licensing for local manufacture and joint ventures, taking into account, wherever appropriate, the model contracts under preparation within the framework of the UNIDO System of Consultations;

(y) establish guidelines on incorporation of basic facilities and services in manufacturing and contractual agreements and investment promotion."[1/]

Correspondingly, document ID/WG.400/2 "Items to be included in model contracts for the import, assembly and manufacture of agricultural equipment including training: model licensing agreement" was presented to the Second Consultation, held in Vienna, Austria, from 17 to 21 October 1983, for discussion.[2/] The Consultation recommended:

"17.The Consultation, taking cognizance of the recommendations of the First Consultation, recommends that:

(a) UNIDO should prepare guidelines for the import, assembly and manufacture of agricultural machinery and training. These guidelines should take due account of the documentation considered by the Second Consultation, the views expressed on it, relevant documents of national and international institutions and the views that may be communicated to the UNIDO secretariat by the participants and other interested parties within the next four months as well as the experience gained in the work on contractual arrangements within the framework of the UNIDO System of Consultations:

(b) Following this, an international group of experts should be convened by UNIDO to agree upon the guidelines, and in this context, the elaboration of master agreements may also be considered. The experts should be selected by UNIDO from developed and developing countries, and from among participants of the Second Consultation, with due regard to an equitable geographical distribution and adequate representation of interested parties:

(c) The group of experts should prepare model contracts based upon the guidelines. In case of disagreement on any specific clause, various alternatives should be presented and given equal weight. The guidelines and model contracts will be submitted for consideration to a next Consultation."

The Secretariat proceeded to prepare, as recommended, an analytical report which compares the relevant provisions of national and international institutions, views other than UNIDO's and other codes. The analytical report was printed as documents ID/WG.443/2 to 7.[3/] On the basis of the analytical report, a document on guidelines to international contracts was conducted.[4/]

An Expert Group Meeting on Guidelines for the Import, Assembly and Manufacture of Agricultural Machinery and Training was convened in Vienna, Austria, from 9 to 12 September 1985,[5/] in which the above-mentioned documents were discussed. This Meeting agreed that it would be a better approach to elaborate the guidelines and include model or illustrative clauses rather than establishing model contracts.

The present final version of the Guidelines and Sample Clauses to International Contracts condense the most relevant aspects of contracts, covering a wide range of situations and are intended to strengthen the negotiation capabilities of developing countries in the field of technology transfers as was stated in the First Consultation and reiterated in the Second one.

1/ Report of the First Consultation on the Agricultural Machinery Industry, UNIDO, ID/239, page 7.

2/ Report of the Second Consultation on the Agricultural Machinery Industry, UNIDO, ID/307, page 8.

3/ R. Fitz Gerald, Comparison of sample clauses for contracts for the initial management of a factory for the assembly or manufacture of agricultural machinery and the rendering of technical assistance ancillary thereto, ID/WG.443/2; Comparison of sample clauses for contracts for the supply of spare parts for agricultural machinery, ID/WG.443/3; Comparison of sample clauses for contracts of the supply and installation of production equipment for the assembly and manufacture of agricultural machinery, ID/WG.443/4; Comparison of sample clauses for contracts for the transfer of know-how, grant of patent/trademark licenses, assignment of technical information and the rendering of technical services ancillary thereto for the manufacture of agricultural machinery, ID/WG.443/5; Comparison of sample clauses for contracts between clients and industrial architects for the design and supervision of the construction of works for the assembly or manufacture of agricultural machinery, ID/WG.443/6; Comparison of sample clauses for contracts for the supply of agricultural machinery, ID/WG.443/7.

4/ R. Fitz Gerald, Guidelines to International Contracts for the Acquisition, Assembly and Manufacture of Agricultural Machinery and Spare Parts therefor, ID/WG.443/1.

5/ For Report, see ID/WG.443/8.

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Introduction

A. THE NEED FOR CONTRACTS

1. On behalf of the member countries, in the last ten years UNIDO spared no effort to assist them in establishing different kinds of guidelines and model contracts to strengthen their readiness, capability and skill to protect the interest of the purchasers (clients, investors, owners, whatever role they played on the market of technology transfer and/or on the market of machineries) when negotiating with the contractors and/or sellers of technology and different types of special machinery. Since the model contracts and the collection of sample clauses are mostly comprehensive documents that require some guidance and the highlighting of several of the recommended stipulations to use them in an appropriate way, especially for less experienced purchasers, guidelines have been prepared also as complement to the sample clauses and model contracts.

2. The aim of the Guidelines is to give the necessary information to the purchasers in developing countries on the different types of contractual commitments which they shall be entering into when deciding to purchase machines, machinery lines, production machinery for the manufacture of agricultural machines, spare parts, or complete factories to develop the local manufacture of agricultural machines for the domestic demand or, even to export such machines to neighbour countries or wherever they wish to do so. Beyond that the Guidelines have to give certain assistance to the readers in setting up management and licence-know-how contracts depending upon the particular situation of the purchasers and the market, respectively, as well as in organizing training for the users of the respective machines.

3. If a developing country wishes to develop its agricultural production, it has to face the following possibilities with regard to its future intentions:

(a) It may acquire a certain quantity and assortment of agricultural machines and the related spare parts; in this case the purchaser prefers to conclude a contract for the supply of agricultural machinery including the supply of spare parts which assure the operation of the machines for a certain

period, e.g. for two years; beyond that the purchaser may order a further quantity of spare parts within the framework of the same contract or he might do it through a separate contract;

(b) Simultaneously with the conclusion of the above-mentioned contract, the purchaser should establish agreements with the supplier on the after-sale service, i.e. he should make sure that the supplier will give him every possible assistance in removing defects of the machines, in the continuous maintenance, repair, replacement etc. of them, if necessary;

(c) Should the purchaser desire to produce a particular machinery, he will have to enter a licensing agreement with the selected manufacturer to obtain the necessary right, including the basic technical documents referring to the know-how and/or patents/trade-marks etc. to use the relevant patent and know-how;

(d) In some cases the purchasers in developing countries employ consultants even at the beginning of their market research work. The consultant has to possess an overall knowledge of the respective market and give full assistance to the purchaser in initiating the marketing, the wording of the inquiries, the evaluation of the offers, bidding documents of the different competitors, the selection of the licensor, etc. This activity needs the conclusion of a consultancy agreement between the purchaser and the consultant (physical or legal person). Should the purchaser decide to organize the local manufacture of agricultural machines and rely completely on foreign assistance, then he may choose different ways to go, beyond the conclusion of the licencing agreement, namely:

- he can conclude a turnkey contract for the purchase of a plant with the selected supplier (which might also include, however not necessarily, the licencing agreement), or

- on the basis of a licencing agreement and the basic know-how, the different production machines for manufacturing the desired agricultural machinery may be bought separately from the relevant vendors with the assistance of the consultant; this type of contract is called "cost-reimbursable";

- to ensure the proper initial operation of the plant to produce the specific type of agricultural machines, the purchaser may enter into a management assistance contract up to a certain period which seems to be sufficient for the employees of the purchaser to master the production process;

- in the case of purchase of a complete plant, the purchaser is incumbent to take care of a satisfactory training of all his employees to deal with the plant in the future; therefore the conclusion of a separate training contract is strongly recommended.

4. The above paragraphs roughly indicate the different types of character of contracts which the purchaser should enter into depending on his decision how and by which methods the agricultural industry in his country should be developed. However, neither the Guidelines nor the sample clauses replace the experience and contractual skill of the purchaser. They rather provide a basis from which a fair balance between obligations, liabilities and financial compensations could be achieved subject to the particular requirements and problems of the respective developing country.

B. GENERAL AREAS OF ACTIVITY AND CONTRACTUAL FORMS

5. As roughly described above, there are various alternatives to be chosen by the purchaser depending on his decision how to go ahead, which method of agricultural development should be carried into practice. The various steps mentioned in para. 3 are each characterized by a contract, the essence of which is being given in these Guidelines.

6. As already indicated in para. 3, the main features of the activity to be followed by the purchaser are the following:

6.1 Purchase of agricultural machines and spare parts, thus the conclusion of the relevant contract. Following the different steps in the field of agricultural development, this would be the simplest contract, relatively speaking, the main content of which is indicated in the present Guidelines.

6.2 Work of a Consultant.

Should the purchaser decide to create a local production line for the manufacture of agricultural machines, subject to the experience level he obtained in the past, he may employ a consultant or set up agreement(s) with a consultant firm who would have the task to assist the purchaser during the whole precontracting procedure, beginning with the elaboration of the inquiries, the feasibility studies, selection of the relevant partner to be entrusted with the establishment of the study, etc.

6.3 Feasibility study.

Since the creation of local manufacture of agricultural machines is a very important decision and entails a costly investment with all the sophisticated methods to be dealt with, careful preinvestment studies have to be carried out before placing an order with any of the engineering companies under consideration. In developing countries with poor or inadequate experience the need for such studies is even more pronounced. The production aspects, the soil quality, the market situation within the country and outside, at least in the neighbourhood, have to be more specifically defined than in those countries where the planning mechanism itself provides more or less reasonable information. As to many details of elaboration of feasibility studies, UNIDO's "Manual for the Preparation of Industrial Feasibility Studies" (1978) may be beneficial to the customers.

6.4 Licencing agreement, technology transfer contracts.

On the basis of the statements of the feasiblity study, the purchaser (owner, etc.) may be able to select the most appropriate process and transferor of technology for his project to establish a production line (factory) for the manufacture of agricultural machinery. The first step in achieving this aim is the conclusion of a licencing agreement, whether with the technology holder or - in other cases - with the transferor of technology, if the latter is also the supplier of the production equipment. Licensing agreements (or separate licensing contracts) are therefore among the most important items in the co-operation between customers (developing countries) and transferors of technology. The commercial transfer of technology to developing countries takes place in accordance with the relevant agreement (contract). It includes the grant of industrial property rights (usually non-exclusively), the submission of the technical know-how documents to the purchaser, the basic designs, the provision of technical services and assistance and, in some cases, elements of future co-operation between the parties in the sale and distribution of the products (agricultural machines).

6.5 Assembly and manufacture of agricultural machinery.

The purchaser has several options when he organizes the assembly and manufacture of agricultural machinery. With regard to developing countries with less experience in this field one of the viable and most common modalitites is the conclusion and implementation of a turnkey job.

6.5.1 General features of a turnkey contract

Within the framework of a turnkey contract the contractor is required, for an agreed contract price (lump-sum, however sometimes with agreed escalation formula), to construct the production plant comprising the conditions of a licencing agreement, to submit the know-how, design and drawings "as built", to implement the engineering services, to supply all equipment (within the agreed battery limits), to undertake all the civil works, erection, testing and commissioning of the plant, demonstration of the guaranteed parameters, the fitness for the purposes envisaged by the parties; appropriate training for the purchaser's personnel. The purchaser takes over the plant only after successful demonstration of the parameters, including the satisfactory fulfilment of all obligations of the contractor. Within the framework of this job the purchaser has only one contractual partner, who is fully responsible for all phases of the construction, including its timely completion and continuous, efficient operation in compliance with the contractual specifications.

A turnkey contract calls upon the purchaser to provide land for the plant, the necessary government permission and approval (these being of national character), the operating and maintenance staff (these people being adequately trained by the supplier or the technology holder in conformity with the training provisions of the contract), the raw materials, components, accessories etc. which have to be assembled with the agricultural machines to be manufactured by the plant and will not be produced in the plant but "imported" from other sources; to make payments to the contractor on an agreed schedule and to pay for customs duties.

6.5.2 General features of a semi-turnkey contract

Many purchasers in developing countries who have already more or less experience with the implementation of larger investment projects prefer the so-called semi-turnkey jobs due to their capability of carrying out civil works, providing local services and assembling production equipment under the supervision of the supplier. Such a solution alleviates the financial burden of the purchaser in foreign currencies without taking over the responsibility for the proper operation of the plant from the supplier. According to UNIDO's view, the semi-turnkey contract is basically a "turnkey" contract with respect

to the supply of the entire plant relating to the project, but with the civil engineering, including the civil works themselves and the erection of the different equipment belonging to the plant, being undertaken by the purchaser or by his sub-contractors. This means that the contract calls upon the purchaser to provide land for the plant, the necessary government permission and approval (these being of national character), undertake the civil engineering and erection of the plant, provide the operating and maintenance staff (this personnel being adequately trained by the supplier and the technology holder, respectively, in full compliance with the training provision of the contract), the raw materials, components, accessories etc. which have to be assembled with the agricultural machines to be manufactured by the plant but will not be produced in the plant, thus "imported" from other sources; to make payments to the contractor on an agreed schedule and to pay for clearance and customs duties.

Consequently, the contractor is required, for an agreed contract price (lump-sum, but with possible escalation formula fixed in the contractual documents), to supply the complete plant on FOB basis, which includes the provision of the know-how, design and engineering services, delivery of all equipment FOB (within the agreed battery limits). In addition, the contractor has to provide personnel for the supervision of the civil works, erection and commissioning of the plant (using the trained personnel of the purchaser, to demonstrate that the plant is fit for the purpose under the contract complying with the specifications and other prescriptions of it. As to the liabiities of the supplier, the main difference between the turnkey and the semi-turnkey contract lies in the fact that the supplier does not take full responsibility for the timely completion of the plant because it depends upon the timely execution of works to be done by the purchaser. Therefore, as to the timely completion under the contract, the contractor's responsiblity is partly limited.

6.5.3 General features of the cost-reimbursable ("cost plus fee") contract

A cost-reimbursable contract (in other terms: "cost plus fee"-type of contract) is suitable for purchasers in countries that have some experience with the precontracting procedure and implementation of industrial investment projects, that have, up to a certain degree, engineering and design

capabilities, experience in the agricultural mechanical field, but lack the organizational skill and expertise to engineer and assemble such a plant without external assistance. From another point of view, it can be stated that some international financing agencies (World Bank, IDA, etc.) prefer a cost-reimbursable contract because it enables the procuring of different items of equipment and machines item by item on the basis of international competitive bidding.

The extent of preparation and detailing of the plant design and specifications for contracting is much less in this type than in a turnkey contract. Hence, minimum time is required for preparing the tender documents and issuing the bids. The bidding time required is also considerably shorter than in other cases. However, since in this type of contract the scope of the project is not entirely fixed at the time of contracting and the requirements of the projects develop as the engineering work proceeds, there could be delays at later stages if adequate care is not taken to adhere to the agreed procedures and time limits.

Besides the advantages of this type of contract for the purchaser, there are, however, several crucial obligations on the purchaser in the course of the actual implementation of the contract. The contractor's performance and adherence to time schedule depends largely on the timely discharge of the purchaser's obligations because the contractor cannot proceed with the execution of the project unless certain actions and approvals required from the purchaser are done promptly. Therefore, the puchaser who opts for a cost-reimbursable contract should have a full appreciation of his role and responsibilities and have the capability to manage the project and coordinate all the activities.

Cost-reimbursable contracts follow various patterns differing from each other in their elements of cost, partly fixed, partly reimbursable, and in the division of responsibilities between the purchaser and the contractor.

In a standard cost-reimbursable contract, as it is usually understood, the contractor is reimbursed for all the costs incurred, including corrective engineering costs arising from inevitable design and construction errors,

provided the contractor exercises normal professional skills, for there are no contingencies in the contract price to cover such costs, as it is the case in the contract price of a turnkey or a semi-turnkey contract. This type of contract is known also as "cost plus fee" contract. The reason for this is that the engineering fee used to be sometimes fixed and all the other costs will be reimbursed (in some contracts the licence fee used to be also indicated as a fixed figure).

6.5.4 Separate contracts

This type of the job may be considered as an alternative of the cost-reimbursable type. It differs from it, however, because in this kind of project implementation to establish the local production of agricultural machinery the purchaser employs a number of suppliers to provide the various services and materials required for the construction of the plant (factory). Each supplier is only liable to the purchaser for the specific equipment, material and services which they are engaged to provide. It is obvious that this alternative for the construction of a factory to manufacture agricultural machinery requires most care, skills and experience from the purchaser, as most of the responsibilities for the proper operation of the plant (factory) lie with the purchaser. On the other hand, there are certain advantages for the purchaser choosing this kind of solution of project implementation. The principal benefit in using this form of a series of contracts is the lesser cost commensurate with the purchaser undertaking other forms mentioned. There are other benefits; the purchaser is not tied to buying only the materials and equipment which one supplier can provide, he can purchase different items from a variety of suppliers; the purchaser can maximize his employment of local contractors thus effecting a saving in foreign exchange and a development of local skills; the purchaser can learn from his greater involvement in the construction of the works, inter alia, he can acquire information about the original sources of materials and equipment enabling him to deal directly with the source suppliers in the future.

C. STEPS AND SEQUENCES OF ASSEMBLY AND MANUFACTURE. PRECONTRACTING PROCEDURE.

6.6 Feasibility studies

Para. 6.3 deals with the need for feasibility studies. The elaboration of feasibility studies is one of the first steps in the so-called precontracting procedure which enables the purchaser to determine the basic issues and figures of his project to develop the agriculture of the country by establishing a factory for the manufacture of specific types of agricultural machines. The study should summarize, but not be limited to, the following:

- Project background and history;
- Market and suggested plant (factory) capacity;
    - Machine types or parts of them to be manufactured;
    - Demand;
    - Sales;
    - Production programme;
- Materials, accessories, inputs;
    - Raw materials;
    - Auxiliary materials;
    - Accessories, parts to be bought from outside;
    - Utilities;
- Location and site description;
- Project engineering;
- Plant organization and overhead costs;
- Manpower;
- Implementation scheduling;
- Financial and economic evaluation;
- Conclusions.

More details about the structure of feasibility studies can be found in several publications of the United Nations and UNIDO.

6.7 Project financing

In many cases it is assumed that project financing is available at the feasibility stage; if this is so, the financial implications are calculated and included in the total production costs. The ascertainment of the financial costs and the economic evaluation of the project as a whole should be based on, but not limited to, the following items:

- Total investment costs;
- Project financing (sources, cash-flow table, etc.);

- Total production costs;
- Financial evaluation;

  e.g. - pay-back period;
  - simple rate of return;
  - sensitivity analysis;
  - cash-flow tables;

- National economic evaluation.

In this context the role of financing institutions in the developing countries and the multinational institutions must be mentioned. Some of them operate on a world-wide scale, such as the World Bank (including the International Development Association and International Finance Corporation), the Kuwait Fund for Arab Economic Development, etc. There are institutions operating on a regional basis, such as the African Development Bank, the Asian Development Bank, etc. In this connection it seems interesting to emphasize the role of the export financing and guaranteeing agencies, such as EXIM Bank of the United States, Hermes of the Federal Republic of Germany, COFACE of France, Export Credit Guarantee Department of Great Britain etc. The primary task of these agencies is, however, to help exporters from industrialized countries; only as a secondary task are they designed to help the developing countries.

6.8 Further steps of the precontracting procedure, tendering, evaluation of competing offers, final selection of supplier(s)

6.8.1 Within the framework of the precontracting procedure the purchaser, upon having examined the feasibility study, may embark upon the business preparatory work on his own or with the assistance of a consultant. The tender documents have to be worked out and the competing companies should be invited to submit their offers.

6.8.2 The evaluation of the offers is the next step to be undertaken by the purchaser. This procedure is fairly sophisticated because there are many aspects, sometimes conflicting with each other, from which the offers should be judged. The description of the methods of the whole-scale evaluation of competing offers would exceed the task and limits of these guidelines, but there are several textbooks and guidelines issued by UN organizations to be examined for this purpose.

6.9 Main phases and sequence of activities to be carefully dealt with during contract negotiations

6.9.1 Technology transfer conditions.

The supplier shall supply the know-how and basic engineering, including, but not limited to:

- General layout plan of the equipment which will form the plant for the production of agricultural machine(s);
- Flow diagram of the process;
- Equipment data and specifications;
- Energy requirements, other utilities;
- Piping system;
- Operational manual;
- Maintenance manual;

etc.

6.9.2 Civil engineering, design of buildings and facilities.

- Basic data for the design of buildings.

6.9.3 Civil works, execution or supervision.

6.9.4 - Inspection of the manufacture of equipment in the workshops;
- Supply and installation of production equipment;
- Supervision (or execution) of the installation works.

6.9.5 Inspection and tests, prior to commissioning and provisional acceptance.

6.9.6 Guarantee and warranty.

6.9.7 - Demonstration of plant guarantees.
- Checking of spare parts delivered under the contract.

6.9.8 Receiving of "as built" drawings.

6.9.9 Final acceptance.

6.9.10 Training.

6.9.11 Management assistance; optional.

D. METHODS OF UNDERTAKING MANUFACTURE AND ASSEMBLY

7. In these Guidelines licensing agreements and the importance of technolcgy transfer conditions are referred to several times. The crucial considerations of the purchaser when deciding how to realize the project, that is the establishment of local manufacture of agricultural machines, are also emphasized. The licensing agreement concerning the technology transfer may be concluded in a separate contract between the purchaser and the technology holder or within the framework of the contract with the supplier of the plant in which case the licensing conditions, rights of using the technology, have to be laid down in special paragraphs and the contractor has to have an agreement with the technology holder under which the contractor is entitled to transfer the technology to the respective purchaser. In the preceding paragraphs some hints were given relating to the problem for the purchaser to select the appropiate process holder. The feasibility study has been extensively dealt with, the recommendations of which used to give sufficient data for this selection in many cases. Beyond that, the purchasers may employ consultants who can help them in making this selection. In general, without going into detail, it can be stated that the whole technology transfer procedure implies some interlinked activities, such as the exact identification of needs in the light of the objectives of the agricultural situation and perspectives of the respective country, the obtaining of reliable information on available technologies (e.g. from different users and/or the recommendations contained in the feasibility study, etc.), negotiations of the most advantageous contractual terms and conditions, adaptation and absorption of the imported technology to and by the agricultural environment of the purchaser's country, optimum exploitation of the acquired technology and maximum utilization of the results of the new technology from various aspects (sale's condition of the machines on the domestic and foreign markets, developmental perspectives of the process etc.). Some contractual approaches and sample clauses are given below.

8. Joint ventures

Historically, foreign direct investment in developing countries has generally been in the form of wholly-owned subsidiary co-operations. Later, and in many cases just recently, a growing number of new investments have been joint ventures, involving shared ownership between local and foreign partners. The purchaser in a developing country, following general governmental instructions to develop the agricutural production by means of local manufacture of specific machines, might implement development projects with the help of technology transfer agreements (in this case the factory to be established will be fully owned by the purchaser subject to the payment conditions of the contract) or with the help of joint venture agreements. Joint venture agrements have various forms, depending upon many particular circumstances. Typical recitals may cover the following items:

- Identification of the parties, including type of business and geographical situation;
- The intention to form a joint venture company;
- Reasons for entry into the joint venture arrangement;
- Detailed description of the business operation to be conducted from the beginning of the implementation of the project up to the commissioning of the plant and beyond that, during normal operation.
- Financial arrangements.
- Any other item(s) which the parties consider necessary to lay down at the foundation of the joint venture business.

Assembly and, at a later stage, manufacture of agricultural machinery may be arranged under more favourable circumstances for the purchaser (owner) if it occurs in the form of a joint venture business. From many aspects of the project the difficulties which arise unevitably during the implementation can more easily be overcome, such as the actual process of technology transfer, organization of the sophisticated co-operation network to be created around the purchaser, to assure the timely and proper assembly of the machines which are designed to improve and increase the agricultural production, etc. UNIDO isssued manuals on this topic, and booklets are available from UNIDO for more details.

E. GENERAL CONSIDERATIONS IN THE DRAWING-UP OF CONTRACTS

9. A satisfactory contract is one which sets out clearly the objectives being pursued by the purchaser and the supplier, accurately reflects the parties' agreement, clearly defines their respective rights and obligations and facilitates the settlement of any disputes which may arise.

9.1 The more precise and clear the words of a contract are, the less likely are later disagreements. In the process of negotiating towards a precisely worded contract the parties' ideas are clarified and their commitments brought home to them. It is necessary for the parties to a contract to draw it up with utmost care so as to make clear their respective rights and obligations.

9.2 However, this drive towards precision may of itself give rise to difficulties. In drafting a contract the parties - particularily when they are attempting to be specific - tend to deal only with those areas of primary or immediate concern thus failing to provide for matters which may become important in the implementation of the contract. It is a general practice in the interpretation of contracts that where detailed clauses and expressions are employed, the absence of a specific provision is assumed to be a deliberate exclusion. To ensure that there are no lacunae in the contract, provisions of more general application should be coupled with more specific ones. In order to give effect to that general provision the more detailed clauses or expressions should be stated to be indicative rather than exhaustive.

9.3 Contracts between compatriots are negotiated and concluded against a background of national law known to both parties. Many matters are not specifically dealt with in such contracts, the parties being content to allow the importation to the contract of their country's law. This is not the position in international contracts. In some contracts the applicable law or courts with jurisdiction over the parties are not unambiguously defined, consequently, some sort of uncertainty is characteristic of such contracts. Furthermore, one party may resist the application of the entire legal system of the other party's country to the contract. Indeed, a national code may not

provide for the regulation of international contractual relations. Thus it is that international contracts provide in detail for many matters often not mentioned in national contracts. The rights and obligations of the parties are not assumed to be those deemed by a particular national law, rather they are specifically and deliberately set out. This usually applies to all the provisions of the contract, not only those made necessary by the very fact of the contract being an international one, e.g. the specification of the applicable law. In this context it should be noted that a number of international conventions exist which can be imported to the contract by specific reference - the contract need only mention their application for these to be read into it (as an example see INCOTERMS, International Commercial Terms). A number of developing countries prefer the applicable law of the contract to be that of their country. In any dispute in connection with the contract the purchaser has an advantage of knowing better his country's jurisdiction and legal procedure than the law of other countries. Of course, it depends upon the actual situation of the competition between the bidders, whether the respective contractor (seller) is ready to accept the applicable law of the contract to be the national one of the purchaser.

9.4 The case of a "cost-reimbursable" or "cost-plus-fee" type project (see para. 6.4 and 6.5.3 above) involves the conclusion of a number of contracts with different supplers. The purchaser must, therefore, ensure that the contracts are compatible. This is of particular importance in the clauses dealing with the consequences of the supplier's delay. Where the purchaser employs this type of contract approach he must ensure that in the event of non-performance or delay on the part of any of the suppliers the latter will compensate him sufficiently to enable the purchaser to discharge any financial obligations he may have incurred towards the other suppliers arising out of the first supplier's delay or failure in performance. Each of the contracts should make specific reference to it being one of a number of contracts for the creation of an enterprise and state its dependence on the other contracts; (e.g. in the case of assembly of agricultural machines or creation of a factory for manufacturing agricultural machines).

9.5 Lawyers the world over use precedents, forms or models in drawing contracts. While, of course, they change many of the provisions of the clauses used in such precedents, these act both as a source of ideas as to the eventual content of the contract in question and as a checklist to ensure that all aspects are provided for in the contract. A purchaser will find it useful to peruse a number of these precedents, forms and models as they will stimulate his ideas as to how to deal with the various aspects of his contractual relations with the supplier. But, **caveat emptor.** These precedents, forms and models, often published by suppliers, must not mesmerize the purchaser leading him to believe that the provisions in such precedents are immutable. Rather, the purchaser should have it foremost in mind that a contract's principal purpose is to reflect the agreement of the parties - the agreement comes first and its negotiation should not be dictated to by these forms and precedents. The agreement should express, up to the extent of a possible compromise, the interests of the purchaser, therefore the purchaser shall bear in mind that he must fight for the enforcement of his interests in the course of the negotiations with the suppliers and the precedents and models are guidelines indeed and do not replace the purchaser's creative and witty style of negotiation.

9.6 In some countries there exists legislation governing certain aspects of contractual relations. This is particularly the case in respect of contracts for the transfer of technology. For instance, in some countries anti-monopoly (anti-trust) legislation limits the length of time for which a purchaser can be bound to buy goods from a supplier. Thus a purchaser negotiating with a supplier should check that none of the terms to be incorporated in the contract infringes any national or international law applicable before signing it.

PART I

GUIDELINES FOR THE SUPPLY AND DISTRIBUTION OF AGRICULTURAL MACHINERY AND SPARE PARTS

This Part seeks to sketch the more controversial clauses particular to the contracts under review. There are certain clauses which are virtually standard in international contracts and which are not specifically referable to the subject matter of the agreement. These last are considered in outline in Part II of these Guidelines.

10. Quality and Suitablility

10.1 A purchaser from a developing country may not have available locally the information necessary to enable him to judge the quality of the agricultural machinery which he proposes to buy. In addition, a novice in the acquisition of that machinery, who has little or no national technical expertise to draw upon, cannot know what particular machinery will best suit the soil and other conditions prevailing in his country. This crucial problem may induce the purchaser to have feasibility studies elaborated by famous suppliers to acquire indispensable information on the soil properties prior to initiating negotiations aiming at the conclusion of a purchase-contract.

10.2 Consequently, there are two approaches which the purchaser can adopt in seeking to ensure the suitability and quality of the equipment: the purchaser can require the testing of the machinery before purchasing it or he can rely on the supplier's representations. These courses of action are not mutually exclusive, a blend of both can be included in the contract. However, as will be seen, the testing of the equipment may water down the effect of the supplier's representations. There are advantages and disadvantages to whichever approach is principally emphasized in the contract.

10.3 Under a number of legal systems a purchaser's reliance on representations made by a supplier will render the supplier liable should any of these prove false. The enforcement of that liability can, of course, contain difficulties in the question of proof and will, most likely, be

subject to the delays and other drawbacks occasioned by Court proceedings. On the other hand, where machinery is tested for suitability or quality, either by the purchaser or an independent expert, the purchaser risks it being deemed that he did not rely on the supplier's statements. Furthermore, if the purchaser is not sufficiently skilled or experienced to test the machinery, he may need to have these trials carried out by an independent expert. The latter testing will undoubtedly increase the purchase price. The purchaser must weigh up the relative merits of the two approaches; the benefit of an early disclosure in tests of defects and of the unsuitability of the equipment against the consequent increase in cost and the possibility of being left with no remedy should the trials fail to uncover defects or the unfitness of the machinery to local conditions. The purchaser can require the inclusion in the contract of an amalgam of these approaches, e.g. the contract can be made conditional upon the supplier testing the equipment in the purchaser's country and achieving certain results.

10.4 If the purchaser is relying on the supplier's representations to aid him in his choice of machinery, then this must be reflected in the contract by the inclusion of a reference to the purchaser's express dependance on the supplier's statements. Whether or not the purchaser decides to employ the testing approach to check on the suitability or quality of the machinery, the representations of the supplier should be assimilated into the contract as warranties or conditions. (In this context it must be noted that under some legal systems the breach of a **condition** of a contract permits the injured party to rescind the contract while most legal systems require the offending party to pay compensation for a breach of **warranty.**) The Final Act of the United Nations Conference on Contracts for the International Sale of Goods deems certain representations implicit in every contract to which it applies. The provisions of this Final Act can be specifically imported to the contract as the "general provision" referred to in paragraph 9.2 above by the agreement of the parties (see also paragraph 9.3) and more specific representations particularized, e.g. that the machinery will suit the purchaser's local conditions.

10.5 The question of the suitability of machinery to local conditions is one of particular concern to a purchaser from a developing country. In order to make certain that this matter is adequately dealt with in the contract the issue of suitability and the issue of quality should be the subject of separate clauses. In such clauses it is advisable that, if the purchaser relies on the supplier's representations, the responsibility of the seller for suitability to local conditions of the machines to be delivered by him shall be emphasized under the contract.

11. After sales service

11.1 Purchasers in developed countries often purchase substitute equipment because of the tax advantages of such a replacement. Furthermore, the sophisticated consumer market in the developed world allows a ready acceptance of the concept of obsolescence. This is far from the case in developing countries where tax advantages are, for the most part, a thing of the future and machinery must be made to work for and beyond its natural life. This situation is mainly due to the lack of adequately skilled personnel, necessary accessories and implements.

11.2 Guarantee

In general, the term "guarantee" means the commitment of the seller that the machines, equipment, tools etc. to be delivered by him will perform those figures, as specified in the contract and the assurance as to the approriate property of these goods. The seller (supplier) must demonstrate unambiguously the capability of these goods to perform the guaranteed values during performance guarantee tests. Such procedure shall be exactly prescribed in the relevant contract (see the following sample clauses: "Inspection and Tests").

SAMPLE CLAUSES: Inspection and Tests

1. The purchaser or his representative shall have the right to inspect and/or test the products to confirm their conformity to the contract specifications. The purchaser shall notify the supplier in writing of the inspection and tests the purchaser requires, where they are to be conducted and the identity of any representatives retained for these purposes.

2. The inspections and tests may be conducted on the premises of the supplier, on the point of delivery and/or at the products' final destination. Where they are conducted on the premises of the supplier, all reasonable facilities and assistance - including access to drawings and production data - shall be furnished to the inspectors at no charge to the purchaser.

3. Should any inspected or tested goods fail to conform to the specifications the purchaser may reject them and the supplier shall either replace the rejected goods or make the alterations necessary to meet the specification requirements free of cost to the purchaser.

4. The purchaser's right to inspect, test and, where necessary, reject the products after the products' arrival in the purchaser's country shall in no way be limited or waived by reason of the products having previously been inspected, tested and passed by the purchaser or his representative prior to the products' shipment from the country of origin.

5. Nothing in this Clause shall in any way release the supplier from any warranties or any other obligations under this contract.

6. Further, the supplier shall have performance and quality tests carried out at a specialized testing centre of world-wide reputation and the said inspection and tests will be at the supplier's cost and expense.

7. Verification of apparent conformity

Example a)

7.1 If the products appear to conform with the conditions and warranties of this contract, the purchaser will provisionally accept the products on their arrival at the purchaser's depot or, should the purchaser so stipulate, on their arrival on the wharves in the port of unloading.

7.2 A representative of the supplier and of the purchaser will inspect the products and, if such is the case, will verify their apparent conformity. The findings of such an inspection will be recorded on the statement of provisional acceptance.

7.3 The sole purpose of the inspection and statement of provisional acceptance is to enable verification to be made of the apparent conformity of the products. A provisional acceptance and verification of conformity will not prejudice or deprive the purchaser of any of the remedies afforded to him under this contract.

7.4 Should any or all of the products appear not to conform to the conditions and warranties of this contract, they shall not be provisionally accepted by the purchaser with the consequences, inter alia, that no delivery of the products will be deemed, no transfer of ownership or risk to the purchaser shall occur and the terms (if

any) regarding liquidated damages payable to the purchaser on the supplier's delay in delivery will apply. The purchaser will notify the supplier in writing of any lack of apparent conformity and will state his objections to the products.

7.5 If, within a period of ..... from the date of notification of non-conformity to the supplier the latter has not remedied the defects in the products he shall pay to the purchaser immobilization costs by way of liquidated damages equal to .% of the price of the products thus immobilized for every week or fraction of a week of immobilization commencing on the date the supplier was notified of the lack of conformity. These liquidated damages for immobilization will replace the liquidated damages payable to the purchaser on the supplier's delay in delivery once they become applicable but will be in addition to such earlier liquidated damages for delay.

7.6 If lack of conformity is not established either on provisional acceptance or during the period between provisional and final acceptance, final acceptance will be deemed to have occurred at the end of the guarantee period for each product as hereafter described.

7.7 In respect of products whose lack of conformity is established either on the inspection for verification of apparent conformity or before the expiry of the guarantee period, final acceptance will be deemed to have occurred when a period equal to the guarantee period has run from the last occasion upon which the purchaser has invoked the guarantee and the supplier has repaired or replaced the products or part of the products.

7.8 The supplier shall pay all the expenses and costs (including duties, taxes, demurrage charges and transport costs) arising by reason of the lack of conformity of the products.

7.9 The purchaser's right of rejection provided under this Clause shall also apply to products which, although delivered and accepted, cannot be properly used without the products mentioned at subparagraph 7.4 of this Clause.

In addition to what is stated in 7.4 through 7.9, another paragraph may be inserted in the contract:

Should the total of the products in which lack of conformity has been established at any time represent ..% of the products delivered to the purchaser by the supplier, the purchaser will be entitled to terminate the contract upon notice to the supplier. Should the purchaser effect such a termination, the supplier will take back all the products which do not conform to this contract, and will repay the prices paid therefor to the purchaser. The relief provided by this Clause is without prejudice to any damages or other relief, to which the purchaser is entitled, whether under this contract or otherwise.

Example b)

7.1 During a period of .. weeks (days) from the date of delivery of the products the purchaser shall be entitled to reject goods which do not conform with this contract (except any defect caused after the passage of rights) provided that before the purchaser can exercise his right of rejection, the supplier shall have an opportunity to make good any default at his expense within a reasonable period.

7.2 The purchaser's right of rejection shall also apply to products which, although delivered and accepted, cannot be properly used without the products mentioned at subparagraph 7.1 of this Clause.

7.3 The supplier shall be entitled to have rejected products returned to him at his risk and expense.

11.3 Warranties, mechanical guarantee period

The method principally used in contracts to ensure a minimum after sales service and the freedom of the goods from defects is that of a warranty. In this context a warranty is a promise to make good - by replacement or repair - any defects in goods which are not due to factors beyond the supplier's control, e.g. misuse by the purchaser. Warranties are limited in time. The purchaser should seek to obtain as long a guarantee (and warranty) period as possible - this period can be measured in time or in hours-use of the machinery. Furthermore, the contract can be made to provide for a new guarantee period to run on equipment repaired or replaced under the guarantee. Time limits must be set within which any faults will be corrected to ensure that the machinery does not lie idle for long. Many contracts provide that, where the supplier fails to perform his obligations under the guarantee, the purchaser will be entitled to repair the goods at the risk and cost of the supplier. Given the circumstances of a purchaser from a developing country, **inter alia**, the fact that he will, most likely, have no back-up equipment, such a purchaser should consider providing in the contract a sanction against non-performance of the guarantee, e.g. the payment of liquidated damages by the supplier.

Unless the contract provides otherwise, once the guarantee period has expired the supplier's only remaining liability is in respect of breach of contract and, under certain legal systems, of what are called **"hidden defects"**. These are defects so fundamental that, although they fall outside

the terms of the guarantee, national laws require the supplier to rectify them. For the reasons explained at paragraph 9.3 above the purchaser should ensure that the contract specifically provides for the rectification of hidden defects. In addition, the purchaser may wish to have the contract provide for the repair and maintenance of the machinery by the supplier on the expiry of the guarantee period - such services will, of course, have to be paid for by the purchaser. (See the following sample clauses).

SAMPLE CLAUSES: Warranties

Example a)

1. The supplier warrants that the products:

(a) are new, unused, of the most recent or current models and incorporate all recent improvements in design and materials save to the extent specifically provided in this contract;

(b) have no defect arising from the design, workmanship or materials or from any act or omission of the supplier that may develop under normal use of the supplied products in the conditions obtaining in the purchaser's country;

(c) are fit for the purposes for which products of the same description would ordinarily be used in the conditions obtaining in the purchaser's country;

(d) are fit for the particular purposes and in the conditions expressly or impliedly made known by the purchaser to the supplier;

(e) possess the qualities of spare parts which the supplier has held out to the purchaser as samples or models;

(f) are of a standard and quality fit for the purpose or purposes for which spare parts of the kind sold and delivered under this contract are commonly bought as is reasonable to expect having regard to the prices, descriptions and all other relevant circumstances;

(g) conform with the specifications;

(h) are free from any right or claim of a third party.

2.(a) The supplier further warrants that the products will conform with the standards and rules following from the laws and regulations of the purchaser's country that are in force at the time when each consignment of products leaves the factory.

(b) It shall be the duty of the purchaser to inform the supplier of any changes in the said rules and standards as soon as they occur.

(c) Within .. days of the supplier's receipt of a notification under subparagraph 2.(b) of this Clause the supplier shall submit to the purchaser an estimate of the cost of the modifications, if any, which are required to be made to the products to enable them to conform with such altered rules and standards. In the said estimate the supplier will specify the dates upon which such modified products can be delivered.

(d) The said modifications, if any, will not be carried out by the supplier save on the express authorization of the purchaser.

(e) In the event of a disagreement between the parties regarding the amount of the estimate or the extension of the delivery dates, the purchaser shall have the option of cancelling that part of the order relating to the products requiring modification.

(f) If the parties agree to the amount of the estimates and the extension of the delivery dates, these will substitute those specified in this contract and all the conditions and terms of this contract will apply thereto.

Guarantee

1. The supplier guarantees that the products will be and remain as warranted for a period of .. months ("the guarantee period") from the date of delivery of each product.

2. The supplier undertakes to remedy any defect or non-conformity appearing in the products contrary to the warranties hereinbefore given during the guarantee period.

3. Where the purchaser wishes to avail himself of the guarantee, he shall notify the supplier in writing without delay of any defect which has appeared. On receipt of such notification the supplier shall, if the defect is one that is covered by this Clause, at his option:
(a) repair the defective products on site; or
(b) have the defective products or parts returned to him for repair; or
(c) replace the defective products; or
(d) replace the defective parts in order to enable the purchaser to carry out the necessary repairs at the supplier's expense.

4. The supplier shall bear all the expenses and costs arising out of and incidental to the implementation of this guarantee and shall bear the risk of any transport of the products and parts arising out of or incidental to this guarantee.

5. If the supplier, having been notified, fails to remedy any defect or non-conformity in the products within a reasonable period, the purchaser may proceed to take such remedial action as may be necessary, at the supplier's risk and expense, and without prejudice to any other rights which the purchaser may have against the supplier under this contract.

6. The said guarantee shall only apply to defects which appear under proper use. It does not cover defects due to causes arising after the risk in the products has passed. In particular, it does not cover defects arising from the purchaser's faulty maintenance, from alterations carried out without the supplier's consent in writing or from repairs carried out improperly by the purchaser save such repairs as may be carried out under this Clause.

7. The guarantee hereinbefore given shall not be interpreted so as to limit the purchaser's remedies, either in time or scope of relief, in respect of any breach of warranty by the supplier. In particular, the supplier will remain liable in respect of any defect in the products or parts thereof rendering them unmerchantable which would not be apparent on a reasonable examination.

Example b)

Optional to 1.(c), 1.(d) and 2., respectively.

1. This contract is conditional upon the supplier, after examining the soil and conditions (including climatic ones) prevailing in the purchaser's country and carrying out any adaptations he thinks necessary to the products, conducting trials with samples of the products, the results of which must attain the standards and descriptions of performance and capacity detailed in the specifications.

2. The products supplied under this contract from time to time shall conform to the standards mentioned in the specifications and, where no applicable standard is mentioned, to the authoritative standard appropriate to the supplier's country. The said standards shall be the latest issued by the concerned institution immediately prior to the time.

2.(e) Should the purchaser cancel part or all of his order under this Clause, the purchaser shall pay to the supplier a sum equal to ..% of the order cancelled.

Guarantee

1. The supplier guarantees that the products will be and remain as warranted for a period of .. hours of operation or .. months ("the guarantee period") from the date of delivery of each product, whichever period first terminates.

In addition to this paragraph, it may be stated that:

A fresh guarantee period equal to that here stated shall apply, under the same terms and conditions as those applicable to the original products, to parts or products repaired or supplied in replacement of defective parts or products and to parts renewed in pursuance of this Clause. This provision shall not apply to the remaining products or parts thereof, the guarantee period of which shall be extended only by a period equal to the period during which such products are out of action as a result of a defect covered by this Clause.

4. Unless otherwise agreed, the purchaser shall bear the costs and risks of transport of defective products and parts supplied in replacement of such defective products or parts between the place where the products are situated and the place where delivery of the products is to be effected under this contract.

7. The supplier is liable in accordance with this contract for any lack of conformity which exists at the time when the risk passes to the purchaser, even though the lack of conformity becomes apparent only after that time. The supplier is also liable for any lack of conformity which occurs after the time indicated in the preceding sentence and which is due to a breach of any of his obligations including a breach of the guarantee that for a period of time the products will re main fit for their ordinary purpose or for the particular purpose required by the purchser and/or that the products will retain specified qualities or characteristics.

Subparagraph 7. above may be replaced by the following subparagraph:

7. Should any hidden defect in the design, manufacture, materials, workmanship or assembly of the products or any part thereof become apparent, the purchaser may at any time, whether within or outside the guarantee period, require the supplier to remedy the defect in the products or product at his own expense whether on site or in his own factory. Should the supplier fail to remedy such a hidden defect within .. days of notification thereof from the purchaser, the purchaser shall be entitled to terminate the contract in so far as it relates to those defective products and any products whose use is dependent on such defective products whereupon the supplier shall take back the said products in respect of which the contract is terminated at the price or prices paid and in addition, pay to the purchaser all the expenses, costs, duties and taxes paid by the purchaser in respect of such products. A hidden defect shall, in this context, be taken to mean any defect in the design, manufacture, material, workmanship or assembly of a product or products which reduces or impedes the product's or products' performance whether by immobilizing the product or products or rendering it or them less efficient, appearing several times in the same product or in several products of the same kind.

In case of non-observance of the guarantee given by the supplier under the contract, the following paragraph may be inserted:

The purchaser may, without prejudice to any remedy for breach of contract, by written notice of default sent to the supplier, terminate the contract in whole or in part if the supplier fails to perform his guarantee obligations under this contract and does not cure that default within ... days after receipt of the default notice from the purchaser.

11.4 Spare parts

The procurement of spare parts is always a crucial area of international business. Provision of spare parts is to be made under two considerations: 1. spare parts that are generally required for periodic replacement and 2. spare parts/components that are generally not required for periodic replacement, but are needed as insurance spares for their failure could lead to serious difficulties in terms of unusability of the machines delivered by the supplier and consequent production loss. In making provision for insurance spares, it is necessary to rely on experience, independent experts or the recommendations of the supplier, where the supplier shall undertake the full responsibility or the availability of the spare parts at the moment of necessity. (See sample clauses below.)

SAMPLE CLAUSES: Spare Parts

Example a)

1. The supplier undertakes to sell and deliver to the purchaser all the necessary spare parts of the products during a period of .. years from the date of delivery of the products.

Example b)

1. The supplier shall carry sufficient inventories to assure an ex-stock supply of consumable spares. Other spare parts and components shall be supplied as promptly as possible but in any case within six months of placement of an order and establishment of a Letter of Credit.

2. The supplier may be required to provide any or all of the following materials or notifications pertaining to spare parts manufactured or distributed by the supplier:

(a) Such spare parts as the purchaser may elect to purchase from the supplier provided that this election shall not relieve the supplier of any warranty obligations under this contract, and

(b) In the event of termination of the production of spare parts:
- advance notification to the purchaser of the pending termination, in sufficient time to permit the purchaser to produce his requirements, and
- following such termination, furnishing, at no cost to the purchaser, the blue prints, drawings and specifications of the spare parts, if and when requested.

In addition, the following paragraph may be recommended:

> The supplier undertakes to sell and deliver to the purchaser all the necessary spare parts of the products during the periods specified in Annex .. as applicable to the various products from the date or dates of delivery. The said periods specified in Annex .. of this contract represent the anticipated life expectancy of the individual products.

11.5 Repair and maintenance

When concluding the contract, the purchaser shall take care of the timely maintenance of the machines delivered by the supplier. The supplier is liable for establishing a tabulated list indicating the relevant machines, components and periods during which these goods have to be investigated and the parts and components already used up are to be replaced. Apart from these planned maintenance measures, the purchaser must be in a position to replace a faulty component immediately when it proves to be unusable. The following chapter deals with this question in greater detail.

11.6 Training

Appropriate training of the purchaser's personnel is one of the most important prerequisites for the proper usage of the machines delivered by the supplier. Therefore, it is recommended that the purchaser makes a careful selection of people to be sent for taining to the supplier's test shops/areas and be put at the disposal of the supplier at the agricultural area where the machines will have to operate, at first under the supervision of the supplier. It is recommendable that the contract should contain adequate provisions for the training of the purchaser's personnel even after delivery of the machines, thus it has to be considered as an after-sales commitment of the supplier.

12. Delivery dates

(a) Experience and adequate financing enable purchasers from developed countries to anticipate their purchase requirements. These purchasers' ease in planning permits them to build into their acquisition's schedule a tolerance for delay. This is not the case for purchasers from developing countries. Accordingly, the supplier to the latter purchasers must be in a position to assure the delivery of agricultural machinery within certain time limits, this means to respect accurately the delivery dates.

(b) A failure in the due delivery may have a series of grave consequences for a purchaser from a developing country. Monetary compensation - of whatever magnitude - may not be sufficient to make good the damage which can result from such tardiness. But, the prospect of having to pay compensation can, of itself, be an inducement to the supplier to adhere to delivery schedules.

(c) UNCITRAL introduces the problem with the following sentence: "If a delay occurs the aggrieved party may ask that this situation be remedied. The remedy will depend on the gravity and the seriousness of the delay. In view of the nature of contracts for the supply and construction of large industrial works, it is to be expected that they will be essentially **performance oriented** and that it will be only as a measure of last resort that the aggrieved party will be entitled to put an end to the contract." Although the purchase of agricultual machinery, as a first step of a developing country to develop its agriculture, cannot be considered as the purchase of "large industrial works", the delayed delivery may cause grave damages. Therefore, UNCITRAL's point of view may apply to the purchasers of agricultural machinery, too.

(d) Two standards of compensation are generally used in contracts, damages and liquidated damages (or penalties). The word **"damages"** refers to those monies required to compensate a person for an injury done to him. Simple damages are calculated after the breach of contract (be it a breach of the delivery schedule or a breach of warranty), bear a direct relationship to the loss suffered by the injured party and are usually limited to compensating the loss which was forseeable by the supplier.

(e) It may be of interest to quote a draft rule adopted by an UNCITRAL Working Group Meeting in 1981 dealing with the issue of liquidated damages and penalties. The rule reads: "Unless the parties have agreed otherwise, if a failure of performance in respect of which the parties have agreed that a sum of money is to be recoverable or forfeited occurs, the creditor is entitled, in respect of the failure, to recover or forfeit the sum, and is entitled to damages to the extent of the loss not covered by the agreed sum, but only if he can prove that this loss grossly exceeds the agreed sum."

(f) **Liquidated damages** represent compensation estimated before the damage arises, that is to say, in the contract - usually calculable at a daily, weekly or monthly rate - and payable on the occurrance of some breach of contract without, necessarily, an investigation of the injured party's loss and, often, without proof of the offending party's culpability. In some contracts the term "liquidated damages" is substituted for the expression "penalty" without giving accurate definition of either term and of their difference, if any, respectively.

(g) A **penalty**, which is not recoverable under some legal systems and, therefore, should not be employed as a sanction unless all the possible legal systems applicable to the contract permit its enforcement, is in the nature of a fine and does not represent a genuine pre-estimation of an injured party's loss as do liquidated damages.) It has to be emphasized in this context that there are some legal systems which empower their courts to review the amount of the penalties and to reduce them should they prove excessive.

(h) The advantage of liquidated damages to the injured party is that the party in default becomes immediately liable to pay them - there is no delay while loss is established. The very immediacy of liquidated damages tends to stimulate compliance with the contract. The disadvantage of liquidated damages lies in the fact that the amount of the compensation is fixed at the outset and cannot be revised when the damage actually occurs. This is a clear drawback as it is not usually possible to determine in advance the loss which may result from a party's breach of contract. Furthermore, as liquidated damages are usually payable whether or not the loss they are meant to compensate actually occurs, they are inevitably fixed at a lower amount than would be payable as damages if a foreseeable loss were to be sustained. There are circumstances in which liquidated damages will only compensate a fraction of the loss suffered. Conversely, the advantage of damages is that they compensate the loss actually sustained to the extent to which it was foreseeable by the defaulting party. The disadvantage of damages is the considerable delay there may be in their award - a delay caused by the Court's necessary intervention to investigate liability and evaluate the damages payable. The fact of lengthy Court proceedings may make the damages irrelevant by the time they are recovered, e.g. where a purchaser has been unable to manufacture by reason of a supplier's non-delivery of some small but essential part.

(i) The purchaser must, in the light of his own circumstances, determine which form of compensation is most suitable to him should the supplier be in breach of contract. In the case of delivery, the method now most commonly employed to seek to ensure that there will be no delays is for contracts to provide for the payment of liquidated damages in the event of the supplier's delay. If due delivery is essential to the purchaser, then the approach to be favoured is, perhaps, that of liquidated damages rather than damages as this method is more likely to induce the supplier to make delivery on time even if, in the event, liquidated damages do not properly compensate the purchaser. As can be seen from the sample clauses below, the liquidated damages or penalities are usually calculated on a percentage basis for each specified unit of time (week, month) up to a maximum amount and that once that maximum amount is reached the purchaser may be entitled to terminate the contract.

(j) The amount fixed as liquidated damages, if this approach is used, should be a genuine pre-estimate of the purchaser's likely loss taking all circumstances into account. The higher the liquidated damages, the more likely these are to motivate the supplier to deliver the machinery promptly.

(k) There are, of course, aspects of delivery other than delay which are of particular concern to a purchaser from a developing country. If machinery is delivered in a completely knocked down form then the purchaser will, most likely, require the supplier to supervise the assembly of the equipment. It is useful to require that the supplier use local employees in this assembly work as this will give the latter an opportunity of familiarizing themselves with the machinery. If the country of delivery does not have good port, road and freight facilities, the contract should provide for the adequate packing of the equipment to meet these local conditions. Furthermore, the purchaser must ensure that the contract provides that each item of equipment be accompanied by all the necessary technical documentation and tools.

SAMPLE CLAUSES: Delivery Dates, Dispatch, Transport and Delivery

1. The supplier will deliver the products in accordance with the delivery schedule particularized in Annex .. of this contract.

2. At least .. days before the date set for the delivery of any consignment of products the supplier shall confirm in writing to the purchaser the quantities of products to be delivered, their packed size and weight and the proposed method of transport and details thereof.

3. Delivery of the products shall be made either FOB, CIF, etc. as may from time to time be agreed between the parties.

Example a)

4. The provisions regarding transport, the payment therefor, delivery and insurance laid down in INCOTERMS will apply to this Clause. Where the supplier is required to affect delivery under terms not dealt with in INCOTERMS, the supplier shall be required to meet all transport, storage and insurance expenses until delivery.

6. Delivery of the products will not be deemed unless and until all the necessary documentation relating to them and their transport has been received by the purchaser. Should the products arrive in port when the said documentation has not been received by the purchaser, the supplier will be responsible for any consequent loss.

Example b)

4. Where the supplier is required to deliver the products FOB, transport of the products until delivery, that is, up to and including the point of putting the products on board the export conveyance at the specified port of loading shall be arranged and paid for by the supplier, and the cost thereof shall be included in the contract price. Where the supplier is required to deliver the products CIF, transport of the products to the port of discharge or such other point in the country of destination as shall be specified in the contract shall be arranged and paid for by the supplier and the cost thereof shall be included in the contract price.

5. All the products shall be fully insured in a freely convertible currency against loss or damage incidental to manufacture or acquisition, transportation, storage and delivery. The insurance shall be in an amount equal to 110% of the CIF value of the products from "warehouse to warehouse" on "all risks" basis, including war risks and strike clauses. Where delivery of the products is required on a FOB basis, the supplier shall arrange and pay marine insurance. (Where delivery of the products is required on a CIF basis, the supplier shall arrange and pay for marine insurance naming the purchaser as the beneficiary; etc.).

6. In the case of FOB contracts, delivery shall be deemed to have been made when the products have been put on board the export conveyance at the specified port of loading and the invoices together with all such other documentation as is specified hereafter have been furnished to the purchaser. (In the case of CIF contracts, delivery shall be deemed to have been made when a clean bill of loading together with the documentation specified hereafter have been furnished to the purchaser; etc.).

7. Subject to Clause .. the products shall remain at the risk of the supplier until delivery has been completed.

Example c)

4. The supplier will arrange for and bear all the costs and expenses of the transport of the products from his factory to the deemed delivery of the products.

5. The supplier shall arrange and pay for the insurance of the products to the point of their deemed delivery and, if necessary, will name the purchaser the beneficiary of the policy. The products will be insured in a freely convertible currency against loss and damage incidental to manufacture or acquisition, transportation, storage and delivery. The insurance shall be in an amount equal to 110% of the CIF value of the products from "warehouse to warehouse" on "all risks" basis, including war risks and strike clauses.

6. The products will be deemed delivered on their provisional acceptance by the purchaser as hereinafter set forth.

SAMPLE CLAUSES: Delays in Delivery

Example a)

1. Should the supplier fail to make delivery of the products within the time fixed therefor there shall be granted to the supplier an extension of the delivery period of .. days.

2. If the supplier fails to deliver the products within the fixed time for delivery or within the extension thereof mentioned at subparagraph 1 of this Clause, the purchaser shall be entitled, upon giving to the supplier within a reasonable time notice in writing, to claim a reduction of the price payable under the contract, unless it can be reasonably concluded from the circumstances of the particular case that the purchaser has suffered no loss. Such a reduction shall equal ..% of the part of the price payable under the contract which is property attributable to each part of the products as cannot, in consequence of the said failure, be put to the use intended for each complete week of delay commencing on the due date of delivery, but shall not exceed the maximum of ..% of the purchase price attributable to the products so delayed.

3. Such a reduction shall be allowed when a payment becomes due or after delivery. Save as provided in subparagraph 4 of this Clause such a reduction shall be to the exclusion of any other remedy of the purchaser in respect of the supplier's failure to deliver as afore-said.

4. If any portion of the products in respect of which the purchaser has become entitled to the maximum reduction provided by subparagraph 3 of this Clause or in respect of which he would have

been entitled had he given the notice referred to therein, remains undelivered, the purchaser may by notice in writing to the supplier require him to deliver and by such last-metioned notice fix a final time for delivery which shall be reasonable taking into account such delay as has already occurred. If for any reason whatever, the supplier fails within such time to do everything that he must do to effect delivery, the purchaser shall be entitled by notice in writing to the supplier to terminate the contract in respect of such portion of the products.

5. The purchaser shall, upon such termination, be entitled to receive from the supplier any loss suffered by the purchaser by reason of the failure of the supplier aforesaid up to an amount not exceeding that part of the price payable under the contract which is properly attributable to such portion of the products, as could not, in consequence of the supplier's failure, be put to the use intended.

Example b)

2. If the supplier fails to make delivery within the said period of grace, then the said delay in the performance of the supplier's delivery obligations will render the supplier liable to the following sanctions:
- the imposition of liquidated damages;
- termination of the contract for default (and - if applicable - forfeiture of its performance security).

3. If, at the end of the period of grace mentioned, the supplier has not observed his delivery obligations, then the supplier will pay to the purchaser a sum equal to ..% of the CIF value of the delayed products for each week or part of a week, commencing from the date upon which delivery was due and disregarding the period of grace during which the delay continues provided that the total of such liquidated damages does not exceed ..% of the CIF value of the delayed products.

4. Once the maximum for liquidated damages has been reached, the purchaser may consider terminating the contract.

5. Sums due from the supplier to the purchaser will be paid in the currency of the contract into the account designated by the purchaser or, alternatively, shall be withheld by the purchaser out of any sums due by him to the supplier.

Example c)

2. Should the supplier fail to deliver the products after the period of grace mentioned has expired, the purchaser shall be entitled to terminate the contract by notice in writing to the supplier, both in respect of all the products undelivered and in respect of goods which, though delivered, cannot be properly used without the undelivered goods. Where the purchaser so terminates the contract he shall be entitled to recover any payment which he

has made both in respect of all the products undelivered and in respect of the products which, although delivered, cannot be properly used without the undelivered products, to reject the products delivered that are unusable and to recover any expenses properly incurred in performance of the contract.

3. The remedy described at subparagraph 2 of this Clause shall be the exclusion of any other remedy for delay in delivery by the supplier.

13. Delays in the purchaser's acceptance of delivery

While on the one hand, in the case of delayed delivery and non-observance of the contractual time-schedule by the supplier the purchaser may be entitled to claim penalties or liquidated damages, on the other hand, the supplier must have the assurance that the purchaser is able and ready to accept the actual delivery of the goods to be supplied under the contract. The sample clauses below show some possible contractual provisions for this problem.

SAMPLE CLAUSES: Delays in the Purchaser's Acceptance of Delivery

1. Should a delay in delivery be caused by an act or omission of the purchaser and whether such cause occurs before or after the time or the extended time for delivery, there shall be granted, subject to subparagraph 4 of Clause ., such extension of the delivery period as is reasonable having regard to all the circumstances of the case.

2. If the purchaser fails to accept delivery on the due date, he shall nevertheless make payment conditional upon delivery as if the products had been delivered. The supplier shall arrange for the storage of the products at the cost and risk of the purchaser provided that if the supplier is in a position to store the products in his premises without prejudice to his business, the cost of storing of the products will not be borne by the purchaser.

3. The supplier may require the purchaser by notice in writing to accept delivery within a reasonable time. Should the purchaser fail to do so within such a time, the supplier shall be entitled by notice in writing to the purchaser to terminate the contract in respect of such portion of the products as is by reason of the failure aforesaid not delivered and thereupon to recover from the purchaser any loss suffered by reason of such failure up to an amount equal to that part of the price payable under the contract which is properly attributable to such a portion of the products.

14. Further contractual provisions generally used in international contracts

As this document does not aim at being complete because its purpose is merely to provide to the reader guidelines and sample clauses belonging to certain contractual stipulations, one must be aware that there are yet various paragraphs and subparagraphs which are generally contained in contracts, beyond those enumerated or indicated in these Guidelines so far. One of the most important is the following:

14.1 Purchase price and payment conditions.

(Please see sample clauses below).

SAMPLE CLAUSES: Contractual Price and Payment Conditions

Example a)

1. The products shall be sold to the purchaser at the prices specified in Annex .. of this contract. Payment shall be made by the purchaser in the manner and in the currencies specified in the said Annex .. of this contract.

2. The supplier shall request payments from the purchaser in accordance with the schedule appearing in the said Annex .. of this contract. The said requests for payment will be made on the fulfilment by the supplier of his obligations under this contract. The said requests for payment will be accompanied by an invoice describing, as appropriate, the products delivered, and by shipping documents submitted in accordance with Clause .. of this contract (Dispatch, Transport and Delivery).

3. Payments shall be made promptly by the purchaser wihin .. days of the submission of an invoice/claim by the supplier made in accordance with subparagraph 2 of this Clause.

Example b)

1. The products shall be sold to the purchaser at the prices specified in Annex .. of this contract.

2. Payment shall be made by the purchaser in the manner and at the time or times specified in Annex .. of this contract.

3. A payment conditional on fulfillment by the supplier shall not be due until such an obligation has been fulfilled, unless the failure of the supplier is due to an act or omission of the purchaser.

4. If the purchaser delays in making any payment and the delay is not due to an act or omission of the supplier, the supplier may:
(a) postpone the fulfillment of his own obligations, until such payment is made; and
(b) recover, after written notice sent in good time to the purchaser, interest on the sum due, at the rate of ... (..%) per annum for each week or a part of a week in which the said payment remains outstanding.

5. Where at the end of .. weeks from the date upon which a delayed payment was due the purchaser shall have still failed to pay the sum, the supplier shall be entitled by notice in writing, and to the exclusion of any other remedy against the purchaser by reason of the latter's delay, to terminate the contract, without prejudice to his right to recover any payment due in respect of delivered products and all expenses properly incurred by the supplier in performing the contract.

Example c)

Any advance payments made by the purchaser are payments on account and do not constitute a deposit, the abandonment of which would entitle either party to terminate the contract.

If delivery has been made before payment of the whole sum payable under this contract (or, where appropriate, before payment of the purchase prices for products from time to time delivered), products delivered (and unpaid for) shall to the extent permitted by the law of the purchaser's country, remain the property of the supplier until such payment has been effected. If the law of the purchaser's country does not permit the supplier to retain the property in the products, the supplier shall be entitled to the benefit of such other rights in respect thereof as such law permits him to retain. The purchaser shall give the supplier every assistance in taking any measures required to protect the supplier's right of property or such other rights as aforesaid.

14.2 Performance security to be submitted by the supplier

A Performance Bond or Performance Guarantee is generally issued by a commercial bank in the supplier's country. In such a Guarantee the provision may be made to enable the purchaser to invoke the guarantee should the supplier default on his obligations without having to obtain the supplier's concurrence or an arbitration decree or an order from a court of competent jurisdiction. In a Performance Guarantee the coverage is generally between 10 to 15 per cent of the contract price. (See sample clauses below).

SAMPLE CLAUSES: Performance Security

1. Within 30 days of the signing of this contract the supplier shall furnish performance security to the purchaser in the amount of .....

2. The proceeds of the performance security shall be payable to the purchaser as compensation for any loss resulting from the supplier's failure to complete his obligations under this contract.

3. The performance security shall be denominated in the currency of the contract or in another freely convertible currency acceptable to the purchaser and shall be in one of the following terms:

(a) A bank guarantee or irrevocable letter of credit, issued by a bank located in the purchaser's country or abroad acceptable to the purchaser and in the form acceptable to the purchaser; or

(b) A cashier's cheque, certified cheque, or cash.

4. The performance security will be discharged by the purchaser not later than 30 days following the date of completion of the supplier's performance of his obligations, including guarantee obligations, under this contract.

14.3 Packing

To ensure safe arrival of the goods at the site, the supplier is responsible for appropriate packing. (See sample clauses below.)

SAMPLE CLAUSES: Packing

Example a)

1. The prices quoted in the contract include the cost of packing.

2. The supplier shall pack the products in the manner required to prevent their damage or deterioration during transit to their final destination as indicated in this contract. The packing shall be sufficient to withstand, without limitations, rough handling, exposure to extreme temperatures, salt and precipitation, open storage during transit and the possibility that the products will be stored for a lengthy period at their port of unloading.

3. The markings within and outside the packages and the instructions, if any, of the packed products must be indicated by diagrams and accompanied by instructions in the purchaser's language.

4. The supplier will be liable for any damage caused to the products by reason of any fault in the materials or design of the packing, marking or instructions.

Example b)

1. The supplier shall pack the products in accordance with his standard conditions of sale. The cost of any additional packing required will be borne by the purchaser. The purchase price of the products quoted in this contract include only such packing as is indicated in the supplier's standard conditions of sale.

2. The requirements of the packing of the goods will be decided by the supplier and the purchaser jointly.

3. The instructions, if any, of precautions to be taken in the handling of the packed products and the markings within and outside the packages will be in an international language.

4. Once the source of any damage caused to the products by reason of any fault in the material or design of the packing, the markings or instructions, has been identified, the parties will negotiate a settlement of the purchaser's claim in respect of such damage.

14.4 Technical documentation

The purchaser must ensure the sending of technical documentation simultaneously with the dispatch of the goods or even earlier by the supplier. (See sample clauses below.)

SAMPLE CLAUSES: Technical Documentation

Example a)

1. The supplier will ensure that each product is accompanied by a free copy of the descriptive and instruction manuals necessary for its operation, by an inspection report and, where appropriate, by a copy of the technical data sheet and/or performance sheet relating to the product in the purchaser's language.

2. The supplier will also provide, free of charge, a tool kit containing such implements and tools as are necessary for the proper operation, maintenance and repair of each product.

Example b)

1. The supplier shall furnish free of charge to the purchaser at the commencement of the guarantee period, information and drawings, other than manufacturing drawings, of the products, in sufficient detail to enable the purchaser to carry out the operation, maintenance and repair of all parts of the products. Such information and drawings will be in the language and shall be the property of the purchaser.

2. The supplier will also furnish with each product a tool kit containing such implements and tools as are agreed between the parties to be necessary to enable the proper operation, maintenance and repair of the products.

14.5 Third party indemnity

In respect of the intellectual property, the purchaser must be fully protected against Third Party's claims. (The most common provisions relating to this problem are given as samples below.)

SAMPLE CLAUSES: Third Party Indemnity

Example a)

The supplier shall indemnify the purchaser against all third party claims of infringement of patent, trade mark or industrial design rights arising from use of the products or any part thereof in the puchaser's country.

Example b)

1. The supplier shall indemnify and save harmless the purchaser in respect of any claim by third parties relating to industrial property rights in the goods.

2. The supplier shall indemnify and save harmless the supplier against any claim made by a user, third party or assign against the purchaser arising out of any damage resulting from a latent defect in the products or a product.

14.6 Use of documents

The use of documents is generally linked with the protection of intellectual property. (See sample clauses below.)

SAMPLE CLAUSES: Use of Documents

1. Any drawings or technical documents intended for use in the construction of the products or of any part thereof and submitted to the purchaser prior or subsequent to the formation of this contract remain the exclusive property of the supplier. They may not, without the supplier's consent, be utilized by the purchaser, or copied, reproduced, transmitted or communicated to a third party. Provided that the said plans and documents shall be the property of the purchaser:-

(a) if is is expressly so agreed, or

(b) if they are referrable to a separate preliminary development contract on which no actual construction was to be performed and in which the property of the supplier was not reserved.

2. Any drawings or technical documents intended for use in the construction of the products or of part thereof and submitted to the supplier prior or subsequent to the formation of this contract remain the exclusive property of the purchaser. They may not, without his consent, be utilized by the supplier or copied, reproduced, transmitted or communicated to a third party.

14.7 Termination of the contract

In every contract the purchaser must provide for the non-observance of contractual commitments by the supplier. The ultimate measure the purchaser may take in case of the supplier's default is the termination of the contract by the purchaser. However, there are occurrences in which the supplier might be entitled to terminate the contract. (See the following sample clauses.)

SAMPLE CLAUSES: Termination of the Contract

Example a)

1. Termination for default of the supplier

The purchaser may, without prejudice to any other remedy for breach of contract but subject to the other terms of this contract, by written notice of default sent to the supplier, terminate this contract in whole or in part:

(a) if the supplier fails to deliver any or all the products within the time periods specified in the contract or any extension thereof granted by the purchaser pursuant to Clause ..;

(b) if the supplier fails to perform any other obligations under the contract; or

(c) if the supplier, in either of the above circumstances, does not cure his failure within a period of thirty days (or such longer period as the purchaser may authorize in writing) after receipt of the default notice from the purchaser.

In the event that the purchaser terminates the contract in whole or in part pursuant to this subparagraph, the purchaser may procure, upon such terms and in such manner as he deems appropriate, products similar to those undelivered, and the supplier shall be liable to the purchaser for any excess costs of such similar products. However, the supplier shall continue performance of the contract to the extent it is not terminated.

2. Termination for insolvency by the purchaser

The purchaser may at any time terminate the contract by giving written notice to the supplier, without compensation to the supplier, if the supplier becomes bankrupt or otherwise insolvent, provided that such termination will not prejudice or affect any right of action or remedy which has accured or will accrue thereafter to the purchaser.

3. Termination for the purchaser's convenience

The purchaser may, by written notice sent to the supplier, terminate the contract, in whole or in part, at any time for his convenience. The notice of termination shall specify that termination is for the purchaser's convenience, the extent to which work under the contract is terminated, and the date upon which such termination becomes effective. The products that are complete and ready for shipment within thirty days after the supplier's receipt of notice of termination shall be purchased by the purchaser at the contract terms and prices. For the remaining products, the purchaser may elect:

(a) to have any portion completed and delivered at the contract terms and prices and/or,

(b) to cancel the remainder and pay to the supplier an agreed amount for partially completed products and for materials and parts previously procured by the supplier.

4. Termination by the supplier

The supplier may terminate this contract or part thereof by giving notice in writing to the purchaser should the purchaser fail to accept delivery of products wtihin a reasonable time of their being ready for delivery. Such termination shall only apply to those products of which the purchaser fails to accept delivery. Upon such termination the supplier will be entitled to recover from the purchaser any loss suffered by reason of the purchaser's said failure up to an amount equal to that part of the price payable under the contract which is properly attributable to such a portion of the products.

5. Rights at Termination

Termination of the contract, from whatever cause arising, shall be without prejudice to the rights of the parties accrued under this contract.

Example b)

1. Termination for default of the supplier

The purchaser may terminate the contract in whole or in part by notice in writing to the supplier should the supplier fail to deliver products within the time periods specified in this contract or any extension thereof granted by the purchaser pursuant to Clause .. hereof. The said termination will apply, at the election of the purchaser, to the products undelivered and the products which, although delivered, cannot be properly used without the undelivered goods. Where the purchaser so terminates the contract

he shall be entitled to recover any payment which he has made, both in respect of all the products undelivered and in respect of the products which, although delivered, cannot be properly used without the undelivered product, to reject the products delivered which are unusable and to recover any expenses properly incurred in performing the contract in respect of such products.

2. Termination by the supplier

The supplier may terminate the contract or part thereof by notice in writing to the purchaser should the purchaser fail to pay for the products or any part thereof within the time periods specified in this contract or any extension thereof granted by the supplier pursuant to Clause .. thereof. Where the supplier so terminates this contract he shall be entitled to recover any payment due in respect of delivered products and all expenses properly incurred by him in the performance of the contract.

14.8 Force Majeure

The usual Force Majeure clauses read as follows:

SAMPLE CLAUSES: Force Majeure

Example a)

1. Any circumstances beyond the control of the parties intervening after the formation of the contract and impeding its reasonable performance shall be considered as cases of relief. For the purposes of this Clause circumstances not due to the fault of the party invoking them shall be deemed beyond the control of the parties.

2. The party wishing to claim relief by reason of any of the said circumstances shall notify the other party in writing without delay on the intervention and on the cessation thereof.

3. Where by reason of any of the circumstances referred to at subparagraph 1 of this Clause the performance of the contract within a reasonable time becomes impossible, either party shall be entitled to terminate the contract by notice in writing to the other party and in that event there shall be such restitution, if any, whether by way of repayment of money, return of goods, or otherwise as shall be just and as the circumstances referred to at subparagraph 1 of this Clause permit.

Example b)

1. Notwithstanding the provisions of Clauses .. and .. the supplier shall not be liable for forfeiture of his performance security, if any has been given, liquidated damages or termination for default, if and to the extent that his delay in performance or other failure to perform his obligations under the contract is a result of an event of force majeure.

2. For the purposes of this Clause "force majeure" means an event beyond the control of the supplier and not involving the supplier's fault or negligence. Such events may include but are not restricted to, acts of the purchaser, wars or revolutions, fires, floods, epidemics, quarantine restrictions and freight embargoes.

3. If a force majeure situation arises the supplier shall promptly notify the purchaser in writing of such a condition and the cause thereof. Unless otherwise directed by the puchaser in writing, the supplier shall continue to perform his obligations under the contract as far as is reasonably practical, and shall seek all reasonable alternative means of performance not prevented by force majeure.

14.9 Limitation of damages

The supplier must be liable for failures, defaults or omissions committed by him. In international contracts, generally the suppliers do not undertake unlimited liability, but they try to limit their liability to an expressed percentage of the contractual price, or to a reasonable fee. (See sample clauses below.)

SAMPLE CLAUSES: Limitation of Damages

1. Damages for breach of contract by one party shall consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract.

2. The party who sets up a breach of the contract shall be under a duty to take all necessary measures to mitigate the loss which has occurred provided that he can do so without unreasonable inconvenience or cost. Should he fail to do so, the party guilty of the breach may claim a reduction in the damages. If the party's failure is due to the failure of a third party whom he has engaged to perform the whole or part of the contract, that party shall be exempt from liability only if:
(a) he is exempt under subparagraph 1 of this Clause, and
(b) the person whom he engaged would be so exempt if the provisions of that subparagraph were applied to him.

14.9 Specified documents

The documents to be sent by the supplier to the purchaser must be specified. (See sample clauses below.)

SAMPLE CLAUSES: Specified Documents

(a) Copies of the supplier's invoice showing the products' description, quantity, unit price, total amount;

(b) Original and .. copies of the negotiable, clean, on board bill of lading marked freight pre-paid and .. copies of non-negotiable bill of lading;

(c) Copies of packing list identifying the contents of each package;

(d) Insurance certificate;

(e) Inspection certificate and the supplier's factory inspection report; and

(f) Certificate of origin.

The above documents shall be received by the purchaser at least one week before the arrival of the products at the port and, if not received, the supplier will be responsible for any consequent loss.

14.10 Applicable law, settlement of disputes

Normally the laws would be those of a neutral country but in many developing countries, particularly where public sector projects are concerned, only the laws of the purchaser's country may be permitted. Therefore, this question should be treated on a case-to-case basis. As to the resolution of disputes, almost all contracts contain a provision for trying to reconcile the parties before formal arbitration. (See sample clauses below showing the most common stipulations.)

SAMPLE CLAUSES: Applicable Law, Settlement of Disputes

Example a)

1. The purchaser and the supplier shall make every effort to resolve amicably by direct informal negotiation any disagreement or dispute arising between them under or in connection with this contract.

2. If, after thirty days from the commencement of such informal negotiations, the purchaser and the supplier have been unable to resolve amicably a contract dispute, either party may require that the dispute be referred for resolution to arbitration in accordance with the UNCITRAL Arbitration Rules.

3. This contract shall be governed by and be interpreted in accordance with the laws of the purchaser's country.

Example b)

1. Any dispute arising out of or in connection with the contract, which the parties have been unable to settle by agreement shall be settled finally out of court by arbitration by the arbitral body specified in Annex .. of this contract.

2. This contract shall, so far as is permissible by the law of the country in which delivery of the goods is to be made, be governed by the law of the supplier's country.

14.11 Changes

Most contracts provide for a smooth working procedure for making changes and variations which may affect some crucial contractual commitments. It is essential, therefore, that such changes are embodied into written change orders. (See sample clauses below.)

SAMPLE CLAUSES: Changes

1. The purchaser may at any time, by a written order given to the supplier make changes wthin the general scope of the contract in any one or more of the following:
(a) drawings, designs or specifications, where the products to be furnished under the contract are to be specifically manufactured for the purchaser;
(b) the method of shipment or packing;
(c) the place of delivery; and
(d) the services to be provided by the supplier.

2. If any such changes cause an increase or a decrease in the cost of, or the time required for, the supplier's performance of any part of the work under the contract, whether changes or not changed by the order, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall accordingly be amended. Provided, however, that any claims by the supplier for an adjustment under this Clause are asserted within thirty days from the date of receipt by the supplier of the purchaser's change order and that the same are accepted by the purchaser.

15. Procurement of spare parts

In general, the purchasers are recommended to acquire the first necessary quantity and assortment of spare parts in the same contract under which the agricultural machines will be bought. Nevertheless, there may be cases in which the purchaser considers it more advantageous for him to conclude a

separate contract, for whatever reason, for the supply of spare parts for those machines, e.g. to fill up a stock to ensure the troublefree operation of existing machines spread over the relevant country. The introduction of such contracts should indicate the definition of important contractual expressions.

SAMPLE CLAUSES: Definition of the most important contractual expressions relating to spare parts

For the purposes of this contract the following words shall be interpreted thus:-

- **"Assemblies and sub-assemblies"** - components of the products which are manufactured by the supplier or, in the case of authorized components, for him, and which are supplied in an assembled form and classified under one heading in the supplier's catalogue.

- **"Authorized components"** - spare parts, assemblies and sub-assemblies manufactured by a person other than the supplier for the supplier or for distribution by him and which are included in the supplier's catalogue.

- **"Conformity"** - the presence in the spare parts of all the conditions of quality, fitness, merchantability and compliance with the specifications as warranted in this contract.

- **"Contract"** - this agreement including all the appendices and attachments hereto and all documents referred to in this contract.

- **"Products"** - all the equipment, machinery, accessories and other apparatus present in the purchaser's country which incorporates or uses the spare parts.

- **"Spare parts"** - those parts, including assemblies, sub-assemblies, and authorized components, of equipment, machinery, accessories and other apparatus now listed in the supplier's catalogue, and manufactured by him or, in the case of authorized components, distributed by him, together with any other parts manufactured by the supplier in the future or in the case of authorized components, distributed by him, together with any other parts manufactured by the supplier in the future or in the case of authorized components, distributed by him during the currency of this contract.

- **"Specifications"** - the standards and performance indicators of the spare parts particularized in Appendix ... "Specifications" also refers to the descriptions of the spare parts, their characteristics, quality and performance capacities as stated by the supplier.

15.1 Stock Management

A purchaser from a developing country commencing a trade in spare parts for agricultural machinery has not the quantity or quality of information available to him as his counterpart in the developed world; the latter can easily obtain nationally supplied training and the relevant machinery sales information. The purchaser from a developing country may be able to acquire the necessary skills and information only from the supplier. The latter is in the best position to know the quantity of machinery present in the purchaser's country which requires the spare parts in question and, further, is aware of those parts most frequently replaced. Accordingly, a contract for the supply of spare parts to a purchaser from a developing country should require the supplier to assist in the initial management of stock. One method which could be employed is to have the contract provide that the initial stock requirements be estimated by the supplier and that, for a period at least, the supplier will accept a return of surplus stock crediting or paying the purchaser the cost of such returned spare parts. Such contractual provision could serve as a "weapon" against the "dumping" of a useless or superfluous quantity of spares. It has to be emphasized, however, that the adoption of this commitment by the supplier is unlikely because of unforeseeable contingencies. (See sample clauses below.)

SAMPLE CLAUSES: Stock Management

Example a)

1. Within a period of .. days/weeks of the entry into force of this contract the supplier shall investigate the stock of products and spare parts present in the purchaser's country and shall determine the type and number of spare parts to be held by the purchaser in order to establish a level of stock which would be considered necessary in good trading practice in the business of the supply of spare parts having regard to the products present in the purchaser's country, any orders for products as yet unfulfilled of which the supplier is aware, the existing stock of spare parts in the purchaser's country and the time required for the fulfillment of orders for spare parts.

2. The supplier shall, within a period of .. days/weeks from the entry into force of this contract:

(a) deliver to the purchaser, in accordance with the provisions hereinafter appearing, the spare parts required to establish the necessary stock level referred to in sub-paragraph 1, and

(b) give to the purchaser advice and information to enable the purchaser to evaluate the said stock level and his future requirements.

3. The supplier will, within .. days/weeks of the entry into force of this contract furnish to the purchaser the documentation listed in Appendix .. of this contract.

4. During the period of .. months from the date of delivery of the spare parts referred to in subparagraph 2 the purchaser shall be entitled to return all and any of the said spare parts then not used, sold or damaged by the purchaser and the supplier shall accept such a return paying to the purchaser or crediting the purchaser with the prices of the said returned spare parts.

Supplier's Obligations

1. In addition to the spare parts delivered by the supplier in accordance with Clause .. hereof the supplier shall deliver to the purchaser the spare parts ordered by the latter during the period of .. years (herein referred to as "the currency of this contract") from the entry into force of the contract.

2. (a) The supplier shall not during the currency of this contract discontinue the supply of any of the spare parts listed in his catalogue at the date of the purchaser's signature of this contract save and unless he replaces the said spare part with one having an identical function and meeting the specifications detailed in Annex .. of this contract.

(b) Should the supplier, during the currency of this contract, manufacture or distribute spare parts in addition to or in replacement of the spare parts appearing in the supplier's catalogue at the date of the purchaser's signature of this contract, the supplier shall inform the purchaser thereof immediately that such new or replacement spare parts are marketed.

(c) The provisions in this contract regarding the prices of spare parts shall apply in respect of any new or replacement spare parts.

3. The supplier shall, at his own cost, furnish the purchaser with a detailed list of the spare parts comprised in any product manufactured by him and exported to the purchaser's country and shall provide the purchaser with assistance in establishing a necessary stock level in respect of each new type of product manufactured by the supplier and exported by him to the purchaser's country.

4. The supplier will grant the purchaser the benefit of the status of most favoured customer.

Example b)

2. The supplier shall, within a period of .. days/weeks from the entry into force of this contract:

(a) deliver to the purchaser, in accordance with the provisions hereinafter appearing, the spare parts required to establish the necessary stock level referred to in sub-paragraph 1, and

(b) concurrent with or within .. days/weeks of the said delivery of spare parts the supplier shall, at his own expense, send to the purchaser's country the skilled staff specified in Annex .. of this contract which staff will, at the supplier's expense, spend a period of .. weeks/months in the purchaser's business training the purchaser and his employees in the skills necessary for the management and operation of a business for the maintenance and repair of the products and the sale, promotion and fitting of the spare parts.

4. During the period of .. months from the date of delivery of the spare parts referred to in sub-paragraph 2 the purchaser shall be entitled to return all and any spare parts then not sold, used or damaged by the purchaser and the supplier shall accept such a return paying to the purchaser the total of the purchase prices of the said returned spare parts and the costs and expenses paid by the purchaser in their regard.

Example c)

1. Within .. days/weeks of the entry into force of this contract the supplier will recommend to the purchaser, by notice in writing, the number and type of spare parts which the supplier judges are necessary to be held by the purchaser in order to constitute a stock level which in good trading practice in the business of the supply of spare parts would be considered necessary having regard to the number of products present in the purchaser's country and the stock of spare parts existing in the purchaser's country.

2. The supplier shall, with all reasonable speed after receipt of the purchaser's first order deliver the spare parts thus ordered by the purchaser and, further, shall furnish the purchaser with advice and information to enable the purchaser to evaluate his additional or future requirements.

15.2 Technical information

Where the supplier of spare parts is also the supplier of the agricultural machinery the purchaser should require the supplier to provide him with a list of the components of such equipment. As the purchaser's trade in spare parts will necessitate his complete understanding of the machinery

and its components the contract should also require the supplier to furnish the purchaser with all the documentation, including diagrams and instructions for repair and maintenance, relevant to the equipment.

15.3 Quality

The remarks made in paragraph 10.1 above about the quality of agricultural machinery to be supplied are equally applicable to spare parts save to this extent: In practice it is unfeasible to apply the approach of having the parts independently tested as can be done in the case of machinery. The purchaser is usually compelled to rely on the supplier's own quality controls. As has already been said, the supplier's representations should be specified in the contract. As to the hidden defects, the warranty clause shall contain the suitable provision. (See sample clauses below.)

SAMPLE CLAUSES: Quality

Example a)

Verification of apparent conformity

1. The purchaser and, where appropriate, a representative of the supplier shall inspect each consignment of spare parts on its arrival at the point of delivery in order to verify the contents of each consignment. If any such consignment does not contain the spare parts ordered by the purchaser then:

(a) the purchaser shall pay the prices of the spare parts ordered and delivered or, if payment has already been made, shall be credited with that sum by which the payment exceeds the total of the prices of spare parts ordered and delivered.

(b) the provisions of Clause .. shall apply in respect of spare parts ordered but not delivered.

2. During a period of .. weeks/months from the date of delivery of the spare parts the purchaser shall be entitled to reject any spare part which does not conform to this contract (excepting any defect caused after the passage of risk) provided that before the purchaser can exercise his right of rejection he shall afford the supplier an opportunity of inspecting the said spare part and to make good any defect at his expense within a reasonable period.

3. The purchaser's right of rejection shall also apply to spare parts which, although delivered and accepted after the time allowed for rejection, cannot properly be used without the spare parts mentioned at sub-paragraph 2 hereof.

4. The supplier shall be entitled to have rejected spare parts returned to him at his own risk and expense.

5. The spare parts shall be deemed to have been finally accepted when the period for rejection provided in this Clause has passed without the purchaser exercising his right in that regard.

Example b)

The spare parts will be inspected to confirm their conformity with this contract on the occasion that each such spare part is put into use. The purchaser shall be entitled to reject any spare part which does not conform to this contract (excepting any defect caused after the passage of risk) provided that before the purchaser can exercise his right of rejection he shall afford the supplier ar opportunity of inspecting the said spare part and to make good any defect at his expense within a reasonable period.

15.4 Delivery dates and delays in delivery

What is stated under paragraph 12. shall also apply to contracts for spare parts. However, where in respect of machinery the purchaser has the option of making provision in the contract for the payment of damages or liquidated damages (or penalties, as the case may be) on the breach of the delivery schedule, the very frequency of the transactions in contracts for the supply of spare parts makes liquidated damages (or penalties) a more suitable remedy for delays in delivery.

15.5 Price

The nature of trade in spare parts is such that a change of supplier usually leads to an upheaval in the purchaser's business. This is more particularily the case when the purchaser, being from a developing country, has not the means to come to know other suppliers. Thus by entering such a contract, indeed, perhaps in entering the original contract for the supply of agricultural machinery, a purchaser from a developing country is binding himself to acquiring spare parts from the supplier for a period of years. To counterbalance this commitment by the purchaser it is usual for contracts for the supply of spare parts to provide that the prices of those parts will remain fixed on an annual basis.

SAMPLE CLAUSES: Price

1. (a) The spare parts will be sold and delivered to the purchaser at the prices appearing in Annex .. of this contract subject to the provisions for price revision herein contained.

(b) Any spare part introduced by the supplier by way of replacement of any spare part included in the list of spare parts appearing in Annex ... of this contract shall be sold and delivered at the price of the spare part which it replaces prevailing on the date of such replacement subject to the provisions regarding price revision hereinafter appearing.

(c) Any new spare part introduced by the supplier other than as hereinbefore provided shall be sold and delivered at the price fixed by the supplier on its introduction and subject to the provisions regarding price revision hereinafter appearing.

2. The price of any spare part may be increased in accordance with sub-paragraph 3 hereof by the supplier on the 1st of January of each year during the currency of this contract provided that any price so increased will remain fixed for a period of 12 months.

3. Any increase in the price of any spare part in accordance with sub-paragraph 2 hereof shall not exceed the average percentage for the year in question of the full range of general export prices for the products, spare parts, assemblies and sub-assemblies manufactured by the supplier.

4. The price of any spare part may be reduced at any time.

5. Any increase in the price of spare parts which the purchaser considers excessive shall be justified and reconsidered by the supplier.

6. Spare parts sold and delivered to the purchaser shall be so sold and delivered at the prices prevailing when the order was placed.

7. The purchaser shall be entitled to the rebate specified in Annex .. of this contract.

15.6 Duration of the contract

The number of years during which the supplier will remain liable to supply spare parts should be laid down in the contract as a reasonable number of years after production of the equipment has ceased. In determining what is a reasonable period regard must be given to the anticipated life of the machinery. As there is the possibility of a bankruptcy of the supplier, the contract should make provision for this case in which the supplier shall be obliged to furnish the purchaser all the information available to enable the purchaser to buy the parts from third parties. Another form of consideration given in exchange for the purchaser's commitment is the accordance to the purchaser of the status of **"most favoured customer"**. The grant of such status in a contract usually means that the supplier is obliged to give the

purchaser, by way of amendment of the contract, any more favourable terms or conditions as may be contained in contracts subsequently entered into by the supplier with third parties. Of course, the "most favoured customer" clause does not resolve the problem, it is a suggestion only, because actually the purchaser has no access to the documents of the supplier. The application of the sample clauses may be helpful but cannot be considered an "allround" solution.

15.7 Sub-contractors and original sources of the parts

The contract should contain a provision according to which the purchaser is permitted to buy standard/proprietary parts from sources other than the supplier. In order to do so, the purchaser must know who these source suppliers are.

15.8 Miscellaneous

Other usual provisions in such contracts as mentioned above are similar or the same as described under paragraph 14, therefore the repetition of relating sample clauses is superfluous.

16. Distribution of agricultural machines

Purchasers in developing countries do not always buy agricultural machines for their own use, but are often in charge, on behalf of governmental authorities, of the distribution of such machines all over the country, of selling them on a broader market. This activity entails the comprehensive knowledge of the stock of such machines available in the country. To come up to this task the purchaser has to accomplish a very serious organizational job by establishing the network of information sources which are, in most cases, local traders. The purchaser, being in the position to buy relatively large quantities of such machines, can reach more favourable purchase conditions, including different from barter businesses, than various purchasers buying only few machines or even one-one from them. It is recommendable to rely upon the experiences related above, that purchasers in developing countries collect carefully the requirements of the country (or of a certain important area within the country) and appear on the world market as one purchaser being in a strong position. The contractual provisions should comply more or less with these Guidelines and the sample clauses given therein.

PART II

GUIDELINES FOR ASSEMBLY AND MANUFACTURE

17. General guidelines applicable to licensing and assembly/manufacture

17.1 Licensing agreements

Paragraph 6.4 gives some introductory words about technology transfer - licensing - agreements. Herewith we try to provide more information on this topic. All over the world there exists extensive literature concerning the questions of technology transfer (i.e. sale of know-how, patents, etc.) which is an important factor in the world-wide endeavour to enhance the industrial strength of developing countries.

The contract under review here is particularly complex, not only by reason of the legal questions involved but also because of the different natures of the elements concerned - patent and trademark rights and the communication of know-how and technology. Only a few aspects of the contract can be mentioned here and then in general terms. A prospective purchaser from a developing country should consult the WIPO "Licensing Guide for Developing Countries" to obtain an overall view of the items to be included in the contract and for a detailed description of the clauses which can be included in the licensing agreement and contract for the transfer of know-how. (As regards the latter, see also "Guide for Use in Drawing up Contracts Relating to the International Transfer of Know-how in the Engineering Industry", ECE/Trade/222/Rev.1). Beyond that the so-called "Pugwash Code" should be mentioned. In 1974, at a meeting in Geneva, Switzerland, the "Working Group on Code of Conduct on Transfer of Technology of the Pugwash Conferences on Science and World Affair" proposed a draft relating to the transfer of technology. It was published and circulated by the UN Conference on Trade and Development (UNCTAD) on 15 July 1974 at the request of the Permanent Representative of Algeria.

With regard to the complexity of the transfer of technology, Mr. Marcus B. Finnegan made a hint in his version "A Code of Conduct. Regulating International Technology Transfer. Panacea or Pitfall" to the Pugwash Code,

writing that "The Code of Conduct for Transfer of Technology should be the object of a multilateral legal instrument to be internationally negotiated and agreed upon, and to become binding on signatories once the conditions for its entry into force, to be established in the legal instrument itself, are fully met". Treating the particular topic of transfer of technology and the relating contractual provisions which deal with intellectual property questions, mention should be made of the UNIDO Model Form of "Agreement for the Licensing of Patents and Know-how in the Petrochemical Industry" which differs, of course, from the legal and technical provisions of the agricultural machinery licensing agreements, however, there are quite a lot of similar or identical stipulations regardless of what industrial branch the actual contract deals with. For information purposes a list is given in the following of the most relevant clauses to be treated within the framework of licensing agreements whatsoever.

List of frequent clauses:

- Rights assigned and granted.
- Information to be delivered (know-how, etc.).
- Transferor's obligations.
- Transferee's obligations.
- Secrecy. Patent infringement.
- Improvements and developments.
- Liability of transferor.
- Limitation of damages.
- Warranties.
- Price, remuneration, royalties, fees.

  etc.

17.2 General guidelines to assembly and manufacture

Contracts relating to the assembly and manufacture of agricultural machinery are, generally, more sophisticated than the contracts treated under Part I of these Guidelines. The assembly of the different parts of machines into complete, properly operating agricultural equipment needs excellent organization on the purchaser's side, beginning with the marketing activity to find out the market's demands, through the placing of orders with several vendors concerning many components of the same type of machine to be assembled

in the assembly hall of the purchaser, up to a continuous output of machines from the assembly line. The purchaser has to master the up-to-date computerized methods for this work which requires long experiences in this field as a first, although extremely important step on the road towards establishing the local manufacturing industry of agricultural machines.

The relevant contracts dealing with the technical, commercial and legal questions of the asembly and local manufacture of agricultural machines contain much more clauses and stipulations than the contracts which deal with the transfer of technology (know-how) only. To give an outline of the related contractual provisions, the table of content of such contracts is given below.

Definitions
Entry into Force
Substantive Transaction
Parties' Representatives
Tests and Inspections of Products
Parties' Preliminary Obligations
Alterations in the Products to be Delivered
Customs and Duties
Supplier's Obligations
Additional Equipment
Supply of Installation Equipment
Staffing of Works
Sub-Contracts
Performance Security
Insurance
Delay in the Supplier's Performance
Delivery of the Products and the Additional Equipment
Delays in the Delivery Occasioned by the Client
Interruption of work
Variations
Defects Apparent Before Taking Over
Tests on Completion
Taking Over
Price and Payment
Client's Failure to Perform
Supplier's Failure to Perform
Warranties
Guarantee
Liability for Personal Injury and Damage to Property
Patent and Other Rights
Access to the Site
Additional Duties of the Supplier
Ownership of Documents
Assignment
Notices
Language
Force Majeure

Termination by the Client
Rights at Termination
Limitation of Damages
Applicable Law
Settlement of Disputes

The specific contractual provisions may vary from contract to contract in function of the particular case, however, the general structure of these contracts is more or less in accordance with the table of content as indicated above.

17.3 Specific guidelines for licensing

17.3.1 Scope of the contract

Should a purchaser desire to manufacture specific products or machinery incorporating a particular technology, he will need to acquire an industrial property licence. A purchaser from a country without a tradition in industry may also need to obtain assembly or manufacturing know-how. It seems advisable here to quote the definition of "know-how" given by the "Licensing Guide" of WIPO in 1977:

> "Know-how means all the manufacturing knowledge - written or oral, whether in the form of unpatented inventions, formulae, procedures and methods, or current and accumulated skills or experience which the transferor has acquired or may hereafter acquire, in so far as may be necessary to the transferee in the design of the product, in the design of the equipment for the manufacture of the product, in the manufacture of the product, or in the operation, maintenance, use, sale or other disposition of the product (application of the process)."

In this connection the know-how to perform the assembly of agricultural machines by the purchaser or the know-how for their local manufacture may be mentioned. That would mean the transfer of all technical information, including drawings, blueprints, diagrams, specifications, instructions, etc. which are necessary and sufficient to fulfil the purpose of the contract. It is extremely important that the purchaser be provided with all information which is necessary and sufficient under the contract. The relevant paragraph must not be omitted from any contract.

Beyond that the contract has to lay down obligations of the transferor in respect of the transfer of technical information on the possible development of the know-how to be transferred under the contract (development of the product, additions to the process in manufacture, etc.)

The contract assigning such rights and providing for the transfer of know-how should define the aspects of the assembly or manufacture of the products in respect of which the supplier is to grant a licence and transfer know-how. The methods by which the technical information and industrial property rights are to be transferred in each such aspect must be

particularized in the contract, with special regard to the exact definitions of the technical content, inherent in the particular know-how being the subject of the contract.

The scope of the contract implies the rights assigned and granted to the purchaser. Some of the usual contractual paragraphs are given below.

The transferor of industrial property rights, such as know-hows used to limit the rights of the purchaser - subject to he agreement of the parties - to use this know-how. The nature and extent of this limitation varies in many cases and the purchaser shall make efforts to reach a fair balance in the contract in respect of the limitation of his rights.

As the value of know-how lies in it or certain aspects of it are secret, the transferor of know-how may require the purchaser not to disclose the information he is acquiring to third parties. Furthermore, both as regards know-how and all other industrial property rights, the transferor of these may - as mentioned - insist on limiting the purchaser's use of them as regards the territory in which the purchaser may exploit them:

(i) in respect of the markets in which he can sell the products manufactured using the know-how and industrial property rights;
(ii) in terms of the time during which the purchaser is entitled to exploit the know-how and industrial property rights;
(iii) as regards the fields of activity in which they can be used.

In addition, the transferor may require the purchaser's undertaking not to purchase from another source technology which competes with that supplied by him. For his part, the purchaser can require the transferor to undertake not to provide the technology or a licence to a third party operating in the purchaser's proposed sales area. Whatever the constraints which the parties agree to impose on one another, these must be detailed in the contract in order to avoid any disputes relating to the application of the mutual limitation of rights in the future.

SAMPLE CLAUSES: Scope of the contract. Rights granted to the purchaser.

Example a)

1. The transferor transfers and assigns to the transferee all the know-how which he has or may obtain, necessary and relevant to the design, manufacture, development, use, sale and maintenance of the products, as designed now or in the future, with all subsequent developments or improvements made during the term of this contract. The transferee accepts the said transfer and assignment.

2. The transferor undertakes not to transfer or assign the expertise referred to in sub-paragraph 1 hereof to any firm in the transferee's country and, further, undertakes not to manufacture or cause to be manufactured in the transferee's country any product or component whose function is within the same range as that of the components or products, or whose basic design or essential parts are similar to those of the components or products.

3. The transferor hereby grants to the transferee and the latter hereby accepts, subject to the terms of this contract, and subject to the requirements of any applicable laws, an exclusive licence for a term of ... years to manufacture, assemble, develop, use, sell, maintain and repair the products in the transferee's country.

4. Save as herein provided, the transferor undertakes not to manufacture, assemble, develop, use, sell, maintain or repair any products or components whose function is within the same range as the products and components or whose basic design or essential parts are similar to those of the products or components and, so far as he is so empowered, not to permit others so to do, in the transferee's country.

5. The transferor hereby grants to the transferee and the latter hereby accepts, subject to the terms of this contract and subject to the requirements of any applicable law, a non-exclusive licence for a term of ... years to sell the products or components manufactured, assembled or developed by the transferee in all countries excluding the transferee's country. Provided that the transferee shall give the transferor written notice of his intention so to do ... days before concluding such a sale.

6. During the term of this contract the transferee shall be entitled to avail of the sales and aftersales facilities and services which are at the disposal of the transferor or his affiliates in the countries to which the transferee is entitled to sell products or components manufactured, assembled or developed by him. Should the transferee propose to sell the said products or components in a country to which he is entitled to so sell but in which neither the transferor nor his affiliates has sales or aftersales facilities or services, the parties will negotiate an agreement for the provision of such facilities or services either by one party acting alone or both parties acting jointly.

7. The transferor acknowledges that he holds under the laws of ..... (country/ies) patents corresponding to the patents which are the subject matter of this contract and the rights which have been granted to the transferee in respect of the transferee's country. As to the said ..... (country/ies) the transferor recognizes that the transferee may wish to export the products or components to the said ..... (country/ies) and agrees that neither the transferor nor any person holding rights from the transferor will bring a suit for infringement against the transferee on the basis of such corresponding patents or to contest the importation by the transferee into the said ..... (country/ies) of the products and components manufactured by the transferee in his country.

8. The transferor authorizes and grants the right to the transferee to obtain in the transferee's country, to the extent permitted by the law of that country, in the transferee's name any of the patents to which this contract applies.

9. The transferor hereby grants to the transferee on the terms and conditons of this contract permission to use as trademarks the trademarks listed in Appendix ... of this contract upon or in relation to the products and components which are put on the market for use or consumption in the countries in which the transferee is entitled to sell the products or components in accordance with this contract.

10. Where it becomes advisable for an application to be made for the registration of the trademarks in the transferee's country the transferee will render all reasonable assistance to the transferor in connection therewith. Should it be desirable that any such application should be made in the name of the transferee, such application will be made by the transferee at the expense of the transferor. Any registration so obtained shall be promptly assigned to the transferor.

11. Notwithstanding the provisions of Clause .. of this contract, the transferee shall be entitled to assign or transfer the rights granted and assigned to him under sub-paragraphs 3 and 5 of this Clause ... to any firm in the transferee's country without requiring the written approval of the transferor.

Example b)

3. The transferor hereby grants to the transferee and the latter hereby accepts, subject to the terms of this contract and subject to the requirements of any applicable laws, a non-exclusive licence of a term of ... years to manufacture, assemble, develop, use, sell, maintain and repair the products in the transferee's country.

5.(a) The transferor hereby grants to the transferee and the latter hereby accepts, subject to the terms of this contract and subject to the requirements of any applicable law, a non-exclusive licence to sell the products or components manufactured, assembled or developed by the transferee in the following countries only: .....The transferee shall not sell the said products or components in any other countries.

(b) For each and every breach of his said obligation not to sell, the transferee shall pay to the transferor as liquidated damages the amount of ..... in respect of each such sale of a component and the amount of ..... in respect of each such sale of a product. The transferee shall further forbid the sale by his purchasers of the products or components to which this licence relates to the extent that such sale is forbidden by this Clause to the transferee and shall impose on such purchasers a liability to pay liquidated damages in respect of each and every such breach of their obligations not to sell the said products and components. Such liquidated damages shall be paid over by the transferee to the transferor.

11. The licences hereby granted to the transferee are not assignable and the transferee shall not assign his rights thereunder to a third party. Without prejudice to the foregoing the transferee shall not, without the consent of the transferor, bring the said licences into the assets of a company. The transferee shall not grant sub-licences without the consent of the transferor who shall not unreasonably withhold such consent.

Example c)

5.(a) The transferor hereby grants to the transferee and the latter hereby accepts, subject to the terms of this contract and subject to the requirements of any applicable law, a non-exclusive licence to sell the products or components manufactured, assembled or developed by the transferee in all but the following countries: .....

(b) The transferee shall ensure that the products and components to which this contract relates are not sold in the countries to which such sale is forbidden as aforesaid. If such products or components are so sold, the transferor shall be entitled, by notice in writing, to determine this agreement and, where such sale occurs by the fault of the transferee, to recover damages.

Addition

Provided that, if, after ... years from the entry into force of this contract, the transferee is not exploiting the market as provided in Clause .. and the transferor serves a notice in writing to that effect specifying the ground of his dissatisfaction and the transferee fails promptly to effect a remedy, the exclusive licence to manufacture, assemble, develop, use, shall cease to be exclusive to the extent that the transferor shall be entitled to appoint not more than ... other licencees.

17.3.2 Developments and improvements

The technology the transfer of which constitutes the scope of the contract, must be appropriate. Once the basic technology is identified and reflected in the relevant designs, drawings, descriptions etc., the parties should treat the question of the technological advances for their common benefit, on a reciprocal basis or non-reciprocal basis, for what duration, for which territories, for what additional price, if any. The parties shall, furthermore, give a clear definition of the terms "improvement" and/or "development", because of the contractual consequences of these, such as to the additional payment obligation of the purchaser and other constraints, if any. Possible definitions of these are the following:

"Development" means any technological advance which is related to the products and which is not an improvement that is the subject of a patent or of an application for a grant of a patent or as well as any technological advance which is not reflected in the technical information."

"Improvement" means any technological advance which is not reflected in an invention or industrial design that is the subject of the patents hereinbefore defined but which is patentable or is the subject of a patent granted or of the application for a grant of a patent and which would, if exploited, reduce the cost of the manufacture of the products or increase the sales of the products.

In international practice, there are several different definitions for these two terms. Whatever definition the parties may contrive, it should be unambiguous for both. Some usual clauses concerning the mutual obligations of the parties in this field, with special regard to development and improvements on the transferee's side, are given below. UNIDO recommends to the developing countries to take care of relevant contractual clauses relating to developments and improvements on the transferee's side so that mutual technical information shall flow from each other. In addition to what the reader may find necessary to insert into the contract, an important clause should be agreed upon relating to the pretesting of usability of any of the developments and improvements effected by the transferor. The relevant clause is given under "Addition" below.

SAMPLE CLAUSES: Development and Improvements

Example a)

1. Each party shall promptly inform the other of any improvements or developments which he may own, possess or control or be aware of and shall provide all available details thereof sufficient to enable the recipient party to use, exploit and practice the same.

2. Any party notifying the other of any matter pursuant to sub-paragraph 1 hereof may at the same time designate the same as potentially patentable, whereupon the recipient party shall keep the same confidential and do all such things as will ensure that letters patent applied for shall not be made void by reason of prior publication, prior use or otherwise.

3. The transferor shall furnish to the transferee, without any delay and free of charge, as soon as laboratory tests are completed and before the transferor applies for the grant of a patent, all information on improvements and developments made or acquired by the transferor during the term of this contract. The type and standard of the information to be so furnished will be that applicable to the

transfer of know-how and licensing of the use of industrial property rights under this contract in respect of know-how and industrial property rights existing at the date of this agreement. The transferor shall grant the transferee the same rights in such improvements and developments as he grants under this agreement in respect of existing know-how and industrial property rights.

4. In the event that the transferor elects, with respect to such improvements, not to apply for a patent or patents, the transferee shall have the right, with the prior consent of the transferor in writing, to apply for a patent or patents in the transferee's own name and at the expense of the transferee.

5. It is agreed that during the term of this contract the transferee shall have the right to use such patent or patents free of charge.

6. The transferee agrees to inform the transferor of the fact of and to furnish to the transferor as soon as laboratory tests are completed and before the transferee applies for the grant of a patent all information on improvements and developments made or acquired by the transferee during the term of this contract.

7. As the transferee may have the right to apply for the grant of patents or improvements, the transferee agrees to make reasonable efforts to obtain such protection.

8. In the event that the transferee elects, with respect to such improvements, not to apply for a patent or patents, the transferor shall have the right, with the prior consent of the transferee in writing, to apply for a patent or patents in the transferor's or the transferee's own name and at the transferor's own expense.

9. It is agreed that during the term of this contract the transferor shall have the right to use such patent or patents non-exclusively but shall not have the right to use such patent or patents issued or registered in the transferee's country.

10. Each of the parties undertakes to inform the other in good faith and without reservation of any uses of the products or components not envisaged by him at the time when this contract was made which subsequently appear to him practicable or which he proposes to put into effect.

11. If, after the expiration of ... months/years from the entry into force of this contract, either party informs the other that a technological advance has occurred which substantially alters the basic technology or that a new technology exists which enables the products to be manufactured in a substantially different manner or with a substantially different effect, the parties shall enter negotiations with a view to modifying the terms of this contract or to concluding a new agreement in its place. If the said technological advance or the new technology has been made or

acquired by, or is available to, the transferor, the said negotiations shall extend to the terms and conditons upon which the said technological advance or new technology will be made available to the transferee; otherwise this contract may be terminated by the transferee in the manner provided in Clause .. hereof.

12. The transferee shall obtain the consent of the transferor before undertaking any modifications or changes to the products.

Example b)

5. It is agreed that during the term of this contract the transferee shall have the right to use such patent or patents free of charge in his own country but subject to payment in all the other countries to which the licence herein granted relates.

6. The transferee agrees to inform the transferor of and to furnish to the transferor, subject to payment to be agreed upon, as soon as laboratory tests are completed and before the transferee applies for the grant of a patent, all information on improvements and developments made or acquired by the transferee during the term of this contract.

9. It is agreed that during the term of this contract the transferor shall have the right to use such patent or patents non-exclusively, subject to the payment to be agreed upon, but shall not have the right to use such patent or patents issued or registered in the transferee's country.

12. The transferee may, without the transferor's consent, make modifications and changes to the products provided that the transferee specifies in a manner apparent to potential and actual purchasers that the said modifications or changes were made by him.

Addition

Nothwithstanding anything contained in this Clause, the transferor shall not propose the use of any improvements or developments until such time as the same have been successfully tested and the transferor has satisfied himself of their utility. In furnishing the transferee with the said information relating to the said improvements or developments, the transferor shall specify to the transferee the nature and consequences of the improvements and developments. The transferor shall not impose the use of such improvements or developments on the transferee.

Should the transferee decide to incorporate the said improvements or developments in the products and/or components to be manufactured by him, and should such incorporation be possible, the transferor shall, in the manner and subject to such terms as are agreed between the parties, study and inform the transferee of the optimum method of their incorporation and shall supply the know-how necessary therefor.

17.3.3 Obligations of the contractual parties

Under 17.1 the list of frequent clauses is mentioned. In these Guidelines UNIDO stresses the importance of careful and exact wording of the contractual parties' mutual obligations. With regard to the great variety of these obligations, it seemed redundant to give sample clauses.

17.3.4 Marketing and after sales service

When the purchaser does not have available locally expertise in marketing, as is often the position of a purchaser from a developing country, he can sometimes make use of his close identification with the transferor - an identification which is particularily strong where the parties share a trademark or where the products are described as assembled or manufactured under the transferor's licence. This identification of the parties permits them to pursue jointly various measures - e.g. advertising - to promote the sale of the agricultural machinery in question. If the purchaser's production capacity is anticipated to exceed local demand than he should consider including in the contract a provision enabling him to use the distribution channels and after sales services developed abroad by the transferor.

17.3.5 Warranties

The warranties and related conditions to be included in the contract for the transfer of industrial property rights (know-how, etc.) are extremely numerous. WIPO's "Licensing Guide" shall be examined in this connection. Within the framework of technology transfer contracts the transferee must be secured against claims by a third person (legal or physical) for infringement of patent rights of third persons. The contract shall, therefore, specify as much as possible the nature and extent of the warranty to be given by the transferor, including the consequences to the transferor in case of successful claim of the third person (e.g. revision of payment conditions, termination of the licensing agreement, etc.).

In view of the fact that the patent systems of various countries differ very much from each other, the major part of the technology supplier is reluctant to give a full-scale warranty ("blanket warranty"). On of the usual clauses may read as follows (see "WIPO" documents):

> "The licensor warrants that, to the best of the licensor's knowledge, the (product to be manufactured) (process to be applied) under this contract, does not infringe (any) (specified country) patents in force on the date of the execution of this contract."

Apart from this clause, there are many other kinds of warranties which are designed to give as appropriate a protection as possible to the transferee against potential infringements (see sample clauses below). The force of such warranties depends, among other conditions, on the market situation.

In respect of the information to be given by the transferor to the transferee, the contract must include, amongst the other warranties and conditions, one stipulating that the information to be transferred and industrial property rights assigned will be sufficient to enable the purchaser to assemble or manufacture the products to the same standard of quality and with the same efficiency as the transferor.

SAMPLE CLAUSES: Warranties

1. The transferor warrants that, to the best of his knowledge, the products to be manufactured under this contract do not infringe any patents, trademarks or other industrial property rights in force on the date of execution of this contract.

2. The transferor warrants that there are no subsisting licences under the patents, trademarks or other industrial property rights owned by the transferor and that no other licences will be granted to any other person and that no commitments have been made to grant any additional licences in respect of the transferee's country. The only subsisting licences granted by the transferor are in respect of the countries listed in Appendix ... hereof.

3. The transferor warrants that as of the date of execution of this contract he has no knowledge of any patent, trademark or other industrial property rights granted or inuring to third parties that would prevent the full enjoyment of the technical information furnished under this contract.

4. The transferor warrants that the industrial property rights, know-how and technical information assigned or transferred under this contract are:

(a) all the industrial property rights, know-how and technical information available to the transferor in respect of or in connection with the products;

(b) sufficient to enable the transferee to manufacture, use, sell, maintain and repair the products of agricultural machinery listed in Appendix ... hereof to the standard of quality hereinbefore defined;

(c) appropriate to enable the transferee's plant and installed equipment, in the conditions prevailing in the transferee's country, to manufacture the said products according to the standard of quality hereinbefore defined.

5. The transferor warrants that the products manufactured to the said standard of quality will be fit for use in the transferee's country in the conditions there prevailing and will meet the performance characteristics for the product set forth in Appendix ... hereof within the normally permitted tolerances. Further, the transferor warrants that the products, manufactured as hereinbefore described, will meet the safety and environmental requirements of the laws and regulations in force in the transferee's country and will at least meet the said requirements as applicable on the date of entry into force of this contract in the countries in which the transferor carries out similar operations.

6. Should the transferor supply equipment (including equipment used in the manufacture of products) the transferor warrants that the said equipment shall be sufficient to enable the manufacture of the products as warranted at sub-paragraph 6 hereof and will enable conformity with articles (b) and (c) of sub-paragraph 4. The transferor further warrants that the said equipment will attain the production capacity specified in Appendix .. hereof.

7. In the event of the transferor supplying the transferee certain additional services the transferor warrants that in respect of those services:

(a) if the transferor designs, supervises the construction or the initial operation of the transferee's plant or supplies equipment therefor, that the said plant will be designed, constructed and operated according to the know-how, technical information and industrial property rights assigned, transferred or approved by the transferor and will be mechanically capable of meeting the operating requirements set forth in the said technical information; and all components of the said plant, including all mechanical and electrical equipment and auxiliaries directly related and essential to operations of the plant, will be in good mechanical and operating condition; the equipment of the plant will be properly responsive to controls and will be capable of sustained operation for the period required for conducting performance tests as hereinafter provided; within ... months from the start-up date the plant will attain at least a yield and reach the planned capacity which satisfies the requirements set forth in Appendix .. hereof.

(b) The training services by the tranferor for the transferee's personnel will be of a quality not less than that provided by the transferor to his own personnel and adequate to meet the needs of the transferee.

8. It is understood and agreed that, in so far as the conditions specified below are applicable, the warranties given in this contract shall apply only if the following conditions are satisfied:

(a) the products are manufactured in accordance with the specifications therefor and the know-how and technical information (and technical services and assistance, if any) to be furnished under this contract;

(b) the workmanship in the manufacture of the products is comparable to the standards observed by the transferor in his own manufacture of the products;

(c) in the manufacture of the products the transferee utilizes the methods and the specifications provided in the transferor's written know-how and the technical information furnished by the transferor as well as the raw materials and semi-finished products and other substances provided in accordance with the terms of this contract, or the transferee utilizes methods, specifications, materials, products or other substances of his own design or supply which are not inconsistent with the aforesaid know-how and technical information and evidently practised or used in the transferor's manufacture of the products to the extent that the transferee has information or actual knowledge of such current practices of the transferor or which, though inconsistent, the transferor has agreed may be utilized.

9. Should the transferor be in breach of any of the warranties hereinbefore given he shall pay damages to the transferee equal to the damage, loss (including consequential loss) and expense occasioned by the said breach.

SAMPLE CLAUSES: Third Party Claims

1.(a) The transferee shall inform the transferor in writing of any claim of imitation of products or infringement of patent, trademark or other industrial property rights and of the commencement of any suit or action in regard to such a claim brought against the transferee which said claim, suit or action is based upon or arises out of the use by the transferee of any design, invention, industrial property right or information supplied by the transferor to the transferee.

(b) The tranferor shall, on receipt of such notice and if so required by the transferee, undertake the defence of such a claim, action or suit at his own expense. The transferor in such case shall have the sole carriage of the said defence and the transferee shall be entitled to be represented by advisory counsel of his own choice. The transferee shall cooperate fully with the transferor in such a defence and shall furnish to the transferor all the evidence in his control.

(c) Should the transferee undertake the defence of such a claim, action or suit the same shall nevertheless be at the expense of the transferor and the latter shall cooperate fully with the transferee in such a defence and will be entitled to be represented by advisory counsel of his own choice.

(d) Neither party shall compromise any such claim, action or suit to the extent that such a compromise places any obligation on the other party without the express written consent of the other party.

Payment of royalties as from the commencement of any such action or suit shall continue so long as the transferee is able to sell the products without a reduction in price. In the event that the said action or suit causes or requires a reduction in price or if a significant reduction in the volume of sales occurs by reason of the said action or suit the royalty payments to the transferor shall be reduced by an amount commensurate with the adjustment necessary by reason of such claim, suit or action.

(e) If the transferee is required to pay royalties to any third person on the products by reason of the transferee's activities under this contract the royalties payable to the transferor shall be reduced by the amount of the royalties payable to such a third person.

(f) In the event that the transferee shall have required the transferor to undertake the defence of any such claim, action or suit, the transferor shall indemnify and save harmless the transferee from any damages or other sums which may become payable under the final decree or judgement of any court in the said claim, action or suit.

(g) The transferor shall not be liable for any imitation of products or infringement of patent, trademark or other industrial property rights in any instance where the particular tool, machinery, equipment, material or process complained of was specified by the transferee. In such an event the transferee shall indemnify and save harmless the transferor in the same manner as the transferor is required to indemnify and save harmless the transferee unless the transferor, having been consulted by the transferee or having had a reasonable opportunity so to do, did not advise the transferee against such a specification.

(h) In the event of any claim of the kind referred to at article (e) above or in the event that the transferor becomes obliged to make a payment to the transferee under article (f) above, the transferor shall have the right, at his discretion, to eliminate the alleged infringement or imitation by, at the transferor's expense, (a) procuring for the transferee an appropriate licence or (b) making changes in the licenced plant provided that the said changes shall not impair the operation of the plant or, if they do, that the transferor shall pay damages to the transferee therefor.

2. The transferor also agrees to indemnify and save harmless the transferee from all and any claims for loss or damage arising out of the use of the technical information or know-how furnished under this contract and from all and any claims for damage or injury to persons or property or for loss of life arising out of or in connection with the manufacture or the use of products manufactured using the technical information or know-how furnished.

3. The parties undertake not to acquire any interest, directly or indirectly, in any firms likely to use the documents and information covered by this contract and to compete with the products; provided that the transferor may grant licences in countries where the transferee enjoys no exclusive right.

4.(a) The parties shall consult each other on methods of preventing third parties from making copies of the products. In particular, they shall assist each other in bringing proceedings against imitators or infringers of patent, trademark or other industrial property rights to the full extent permitted by the law of the transferee, or, where appropriate, of the third party against whom such proceedings are taken.

(b) The said proceedings shall be taken by the transferee or, if he so requires, the transferor, and the transferor shall be liable for the costs and expenses threreof. The party who has sustained damage or loss by reason of the said imitation or infringement, or if both parties, proportionately to their loss or damage, shall enjoy the benefits thereof, the other party providing, if need be, all necessary authorizations and signatures.

17.3.6 Price

(a) Payment for industrial property rights and know-how can be made by way of a lump sum, fees or royalties or by a combination of these.

(b) A **lump sum** may be payable either in one single amount or by instalments agreed upon in the contract, these last at a fixed rate or at a decreasing rate. If such a lump sum payment is required to be made, then it may be beneficial to the purchaser to limit the amount - leaving the balance of the price to be paid in royalties - and to have any lump sum payable staged over a number of instalments.

(c) **Royalties** are recurring payments, calculated after the grant of the licence and transfer of know-how, the amounts of which are determined by reference to the extent of the exploitation of the know-how and licence. In order to establish the degree of the exploitation of the know-how and licence (so as to be able to calculate the royalties), reference must be made either to the volume of production, the selling prices of the products or the purchaser's profits.

(i) When royalties are payable in respect of each product manufactured, it is usual that the amount of the royalty payable be expressed as a fixed sum, not as a percentage of the cost of manufacture or the selling price. Due

to financial constraints a purchaser from a developing country is usually not in a position to make payments in advance of the return to him of his initial investment in the acquisition of the works. Thus, the payment of royalties on the production of agricultural machinery, before the purchaser has had an opportunity of selling the products, may be an unsuitable method for him to employ.

(ii) Royalties related to sales are paid only when each product is actually sold. Where royalties are linked to sales the contract must provide the criterion of calculation to be used to arrive at the "selling price", a percentage of which is payable as a royalty. The "selling price" can be the gross selling price or the net selling price. The use of the gross selling price as the basis of calculating royalties does not favour the purchaser - particularly if the supplier's contribution to the project as a whole is not great - as it includes not only those parts of the products manufactured under the licence or with the aid of the know-how transferred but also those parts produced with technology and skills acquired by the purchaser from other sources. The more advantageous method of calculation for the purchaser is based on the net selling price, that is to say, the selling price less the cost or value of certain items unrelated to the licence and know-how in question. This last method of payment of royalties most accurately reflects the contribution of the supplier to the manufacture of the products. To ensure the payment of maximum royalties even in the event that the purchaser sells the products he manufactures or assembles at an unreasonably low price, contracts sometimes provide that the "selling price" is to be deemed the "fair market price" as defined in the contract.

(iii) Where royalties are ascertainable by reference to the purchaser's profits, no royalty payment is due until the enterprise begins to make a profit from sales of the agricultural machinery produced. This method of calculating royalties is usually the most favourable to the purchaser (with the system of calculating royalties on the net selling price running second favourite). However, the transferor may be reluctant to accept such a method of calculation unless he is reasonably convinced of the likelihood of early profits to the purchaser's operation. This is one of the reasons for which joint ventures should be established with the transferor in order to enable the transferee to undertake the operation under acceptable conditions by promoting the economic involvement of the transferee in the business.

(d) The fees payable for additional technical assistance may be included in the lump sum and/or royalties payable. If they are not, then such fees are likely to be payable on the basis of one of the methods described above. In case of paying royalties the transferee is committed to keep true and accurate files and books of account or other records to permit the transferor to verify the basic data for computation of the royalty instalments to be paid by the transferee. If required by the transferor, the transferee must allow an independent auditor, appointed by the transferor, to inspect the records thereof. The related contractual clauses shall be laid down in a careful and unambiguous way to take precautions against future disagreements.

The contract should also provide clauses regarding measures to be taken if in the transferee's country rules, regulations or other governmental orders are to amend the agreed method of payment.

17.3.7 Liability of the transferor

The contract shall contain adequate provisions to express the liability of the transferor under the contract. The transferor shall be deemed liable for any breach of the contract due to negligence, breach of warranty etc. If the contract deals only with the transfer of intellectual property rights, the transferor used to introduce in the contract a relatively low financial limitation of his liability in case of failure for whatever reason. The transferee should seek a mutually acceptable counterbalance. Sound competition may contribute to reaching this goal.

17.3.8 Assignment

International contracts contain provisions for possible assignments of contractual rights, but prescribe the written consent of the other party to it. Sample clauses are given below.

SAMPLE CLAUSES: Assignment

1. Save as hereinafter provided neither party shall, without the prior written consent of the other, assign any of his rights or delegate any of his duties under this contract or under any agreement supplementary thereto, except to his legal successor or to any legal person acquiring all or substantially all the business and assets of such party.

2. The transferor may assign the right to receive royalties or other remuneration payable by the transferee under the terms of this contract to any bank or financial institution or other legal person, provided that notice in writing is given by the transferor to the transferee at least ... days before any of the dates indicated in sub-paragraph .. of Clause .. of the name and address of such legal person and of the date from which such royalties or renumeration should be paid to such legal person.

Additions (I)

(a) The transferee may extend the benefits of this contract from time to time to any one or more of the transferee's present associates; provided, however, that each associate of the transferee to which such extension is made shall agree to be bound by all the other terms and conditions of this contract to the same extent as the transferee is bound hereby.

(b) The transferee will promptly notify the transferor in writing of each such extension made by him as herein provided.

(c) The transferor agrees that he will accept from such associates of the transferee statements and royalty payments in respect of operations of such associates hereunder in lieu of statements and royalty payments from the transferee in respect of such operations.

(d) The transferee shall be and remain primarily responsible for the making of statements and the payment of royalties in respect of such operations as well as for the performance of all other obligations under this contract of such associates.

Additions (II)

(a) The transferee may extend the benefits of this contract to any agency or institution of the Government of transferee's country, provided such agency or institution shall agree to be bound by all the terms and conditions of this contract to the same extent as the transferee.

(b) In the event of such extension the transferee will promptly notify the transferor in writing and the operations of such Government agency or institution shall be deemed, for the purposes of this contract, to be operations of the transferee.

(c) The transferee shall be and remain primarily responsible for the payment of licence fees in respect of such operations as well as for the performance of all other obligations under this contract of such Government agency or institution.

Additions (III)

The transferee may, with the consent of the transferor, extend the benefits of this contract to any one or more of the transferee's future associates or to any third person upon such terms and conditons as may be agreed upon among the transferor, the transferee and any such associate or third person and, where appropriate, subject to the action of any Government body concerned.

17.3.9 Termination

The contract shall contain provisions for cases of termination. Several events may occur that would involve the termination of the contract by either party. The usual sample clauses relating to termination may read as follows.

SAMPLE CLAUSES: Termination

1. In the event of failure or neglect of either party hereto to fulfill any of his obligations under this contract and if the other party gives written notice of such default, then if such default is not cured within ... days after the giving of such notice, the party giving such notice shall have the right to terminate this contract at any time thereafter, provided the default is still in existence, by giving written notice of such termination to the defaulting party.

2. If either of the parties hereto becomes insolvent or makes an assignment for the benefit of creditors or proceedings in voluntary or involuntary bankruptcy are instituted on behalf of or against the said party or a receiver or trustee of the said party's property is appointed, this contract shall forthwith terminate without further action or notice.

3. The transferee may terminate this contract at any time by giving ... days' written notice to the transferor upon the occurrence of any of the following events:

(i) after the date upon which royalties are no longer payable under Clause .. hereof or when the transferee shall have acquired a paid-up licence for the then existing capacity of the plant in accordance with the said Clause .. following the start-up date of the plant, whichever shall last occur;

(ii) the failure of any warranty set forth in Clause ..;

(iii) the failure to supply the technical information as provided in Clause .. or the technical services and assistance as provided in the said Clause ..;

(iv) the occurrence of technological advances which substantially alter the basic technology or the availability of new technology which enables the product to be manufactured in a substantially different manner or with a substantially different effect as referred to in sub-paragraph .. of Clause ..;

4. The transferor may terminate this contract at any time by giving ... days' written notice to the transferee upon the occurrence of any of the following events:

(i) whenever amounts payable to the transferor pursuant to Clause .. have not been received in full by the transferor within a period of ... months from the dates on which the statements shall be submitted pursuant to sub-paragraph .. of Clause ..;

(ii) failure to make payments on the ground stated in sub-paragraph .. of Clause ..;

(iii) if the transferee fails to take reasonable measures to safeguard against the disclosure of technical information provided for in Clause .. and as a result of that failure the technical information is disclosed or communicated to unauthorized persons;

(iv) if the transferee is not exploiting the market as provided for in Clause ...

5. Without prejudice to the foregoing sub-paragraphs of this Clause, this contract may be terminated for any cause sufficient to justify termination under the proper law of this contract.

6. (a) In the event that the transferor, in accordance with this Clause, terminates the contract prior to the expiration of the term hereof, the transferee, unless he has substantially performed all his obligations under this contract, shall return all the technical information in written or visual form and shall, for a period of ..... not disclose or communicate or use such technical information except as hereinbefore provided.

(b) In the event that the transferee, in accordance with the terms of this contract, terminates this contract prior to the expiration of the term hereof, the transferee may continue to exercise all rights under the licence of any of the patents or of any patent of improvement granted hereunder and to use the technical information supplied under this contract for the duration of the licence subject, however, to the provisions of Clause ...

SAMPLE CLAUSES: Waiver

1. No omission or delay on the part of any party hereto in requiring a due and punctual fulfillment by the other party hereto of the obligations of such other party shall be deemed to constitute a waiver by the omitting or delaying party of any of his rights to require such due and punctual fulfillment of any other obligations hereunder whether similar or otherwise, or a waiver of any remedy he might have hereunder.

2. The failure on the part of either of the parties hereto to exercise or enforce any right conferred upon them hereunder shall not be a waiver of any such right nor operate to bar the exercise or enforcement thereof at any time or times thereafter.

3. Waiver of any breach of any provision hereof shall not be deemed to be a waiver of any other breach of the said provision or any breach of any other provision hereof.

17.3.10 Miscellaneous

The purpose of this paper is to serve as guidelines for purchasers of agricultural machines who intend to establish the local assembly and manufacture of such machines, and not to set up a complete model contract, i.e. this paper does not indicate all stipulations which belong to international contracts dealing with technology transfer. A list of paragraphs figuring in almost every contract is given below, however, without the ambition of being complete.

17.3.11 Recitals (preamble), describing the background of the contract.

17.3.12 Force Majeure

17.3.13 Consequences of termination or expiry of the contract.

17.3.14 Settlement of disputes.

17.3.15 Applicable law.

17.3.16 Entry into force of the contract.

17.3.17 Standards to be applied.

17.3.18 Security of performance.

17.3.19 Failure to perform (breach of contract).

17.3.20 Subcontracting.

17.3.21 Special provisions for the price if, beyond license fee or royalty, the purchaser has to pay for goods to be delivered by the transferor. The related payment conditions are more or less the same as in contracts for the supply of equipment.

17.3.22 Language.

etc.

17.4 Specific guidelines for assembly/manufacture of agricultural machinery

Paragraph 5 of these Guidelines shortly described the contractual forms prevailing today and concluded between developed and developing countries for the supply of know-how and/or patented technological processes and/or special purpose machines (equipment) and/or complete production lines ("Plants") and/or establishment of turn-key factories including civil engineering and civil works. Obviously, even more time is needed for the preparation,

negotiation and final selection of the supplier in the case of contracts dealing with the supply of production equipment for the assembly and manufacture of agricultural machines than in the case of licensing agreements.

The following paragraphs describe the most important and relevant stipulations and related sample clauses emphasizing that the purchasers in the respective developing countries must be fully aware of the fundamental concept of the contractual form (whether turn-key or cost reimbursable or many searate contracts) they choose for their purposes. Since the provisions of licensing agreements have already been dealt with in detail in these Guidelines, such clauses, which are often a precondition for the supply of production equipment, shall not be mentioned any more in connection with contracts for the supply of production equipment.

17.4.1 Equipment to be supplied and services to be performed

(a) The contract must, of course, particularize the production equipment to be delivered by the supplier and the installation work to be carried out by him. The purchaser may find that certain elements of the equipment are available in his own country and may desire to purchase these locally rather than to import them. Where equipment is purchased from different sources it is usually better to have one party, preferably the main supplier, install all the production equipment.

(b) In manufacturing processes appropriate technology should be used. Given that the purchaser's country, if it is a developing one, may lack a tradition in industry, the purchaser may require the supplier's assistance in this regard. To this end a provision should be included in the contract requiring the supplier to keep the purchaser informed of any technological changes and enabling the purchaser to alter his order for equipment before some date defined by reference to the delivery schedule. Alternatively, the supplier should be required to warrant that the production equipment will incorporate the most suitable technology as of a certain date.

(c) In the introductory part of these Guidelines reference is made to the main features of the various types of contract. In this connection it should be underlined again that the major difference between the types of contract may be expressed by the different nature of the risks and liabilitlies of the supplier (or contractor). The more comprehensive the supplier's supply and

services are, the more responsibility, and consequently, the more risks shall be borne by the supplier. On the other hand, the supplier's liability (in its technical and commercial terms) decreases with the scope of delivery and services to be effected by him under the contract. (See sample clauses below.)

SAMPLE CLAUSES: Substantive Transaction

Example a)

Subject to the terms of this contract, the supplier shall sell and deliver the products and shall supervise the assembly, erection and installation of the products and the additional equipment in consideration of the payment to him by the client of the price for the works hereinafter specified.

Example b)

Subject to the terms of this contract, the supplier shall sell and deliver the products and shall assemble, erect and install the products and the additional equipment, all of which said works shall be carried out under the direction and to the reasonable satisfaction of the engineer/industrial architect hereinafter appointed by the supplier for the purposes hereof, in consideration of the payment to him by the client of the price for the works hereinafter specified.

17.4.2 Planning of the factory ("Plant") where the production equipment will have to be located

Since the planning implies the basic engineering project which will be granted generally by the licensor (technology transferor) and which reflects the know-how for the production line, the relating contractual provisions shall be examined in the respective chapter of these Guidelines.

17.4.3 Design of civil works

No matter whether the purchaser ("Client") concludes a turn-key contract with the supplier ("Contractor") or wants to establish the assembly or the local manufacture of agricultural machinery on a cost reimbursable contractual basis, or even by way of various different contracts, the licensor of the know-how shall be responsible for the design of civil works because he is well aware of the basic data of his technology. Therefore the contract shall contain the clause under which the supplier ("Contractor") shall supply the building line drawings, machinery and piping lay-out, road and rail lay-outs for approval by the purchaser ("Client").

17.4.4 Construction and supervision of civil works

The construction of the civil works may take place in different ways. The main methods to be chosen by the purchaser are the following:

(a) Under a turn-key contract the contractor shall be responsible for the construction of the civil works (see paragraph 6.5).

(b) Under a cost reimbursable contract the purchaser conveys the task to a construction company (in the following: "industrial architect") and transmits to it the basic data coming from the technology transferor. In this case the engineer/industrial architect will be responsible for the detailed engineering and the entire construction works (see sample clauses below).

(c) Although, under a turn-key contract, the contractor undertakes the full responsibility towards the client for the implementation of the project, he may, with the approval of the client, assign the engineer/industrial architect as sub-contractor for the execution of the civil works.

The structure of the contract (or sub-contract) for the construction of civil works is more or less the same, whether alternatives (a), (b) or (c) are chosen by the client. In some cases the engineer/industrial architect is only an adviser to the cient from whom he gets authorization to award contracts for the execution of civil works and the engineer/industrial architect provides all the technical data, drawings, instructions etc. to the executing companies, including the evaluation of the offers of bidders, etc.

SAMPLE CLAUSES: Introductory Preamble to a contract with an engineer/industrial architect for the construction of civil works

THIS AGREEMENT is made BETWEEN ..... of ..... (hereinafter called "client) and ..... of ..... (hereinafter called "the engineer/industrial architect")

WHEREAS:

1. The client is desirous of erecting a facility for the assembly, manufacture, supply, maintenance and repair of agricultural machinery in his own country.

2. The engineer/industrial architect has for some time in his professional capacity provided the necessary design, engineering, construction management and co-ordination and supervision services for the design, construction and establishment of assembly and manufacturing facilities and has acquired all the specialized and up-to-date knowledge and skills therefor.

3. The client is desirous of appointing the engineer/industrial architect to provide the said services in the design, construction and establishment of the said assembly and manufacturing facility.

4. The engineer/industrial architect is aware that the client has not available to him in his own country a tradition in industry and, further, the engineer/industrial architect is mindful that the consummation of this agreement is intended to aid and be in the interest of the industrial and economic development of the client's country.

Now, in CONSIDERATION of the premises and of the mutual covenants and conditions herein contained the parties here to have agreed and do by these presents agree as follows:

Scope of services

The engineer/industrial architect will provide detailed engineering in full compliance with the basic design of the technology transferor and will supervise the construction of the works, giving advice, inter alia, on the tendering of bidding and award of contracts. The contract between the client and the engineer/industrial architect describes in detail the duties of the engineer/industrial architect, his liabilities and responsibility concerning important decisions subject to the approval of the client.

SAMPLE CLAUSES: Scope of Services
(of entrepreneurs executing the construction works)

The engineer/industrial architect will provide drawings, specifications, other contract documents and all necessary services to ensure the proper planned co-ordination and execution of all the building and infrastructure works required in the construction of the said works.

17.4.5 Technical Information

(a) In order to be in a position to plan the construction work the purchaser must have available at an early stage all the technical information relating to the plant. The contract must make specific provision for the early delivery of these data.

(b) The purchaser must ensure that the contract requires the supplier to furnish the former with all the instructions, drawings and information necessary to enable the purchaser to maintain and repair the plant. Indeed, the purchaser should consider including in the contract a provision entitling the purchaser (with his employees) to attend during the manufacture of the

plant at the supplier's factory or wherever the machinery is being produced so as to familiarize himself with the machinery. This latter provision could be coupled with one requiring the testing of the plant in the purchaser's presence. It is advisable that the persons attending the manufacture and testing procedure in the workshops shall be the same as those present at site during the erection, assembly and installation of the respective equipment, i.e. the whole production plant. The following sample clauses refer to the supplier's obligation in respect of providing the necessary information to the client. The 'supplier' is the licensor or the contractor, as the case may be.

SAMPLE CLAUSES: Obligations of the supplier
(concerning technical information to be given to the client)

Example a)

The supplier shall:

(a) before the ..... (date) provide the client with drawings showing the manner in which the products and additional equipment are to be affixed, together with all information relating to the works required for preparing suitable foundations, for providing suitable access for the products, additional equipment and equipment necessary for the execution of the works to the point or site where they are to be installed or used and for making all the connections necessary to the products and additional equipment. The said drawings and documents will include the specifications necessary to enable the client to purchase the appropriate additional equipment;

(b) submit to the client for his approval a programme showing, in such form as may be reasonably required by the client, the order of procedure in which he proposes to carry out the works including the design, manufacture, delivery to site, erection and commissioning thereof. The programme shall also indicate the times by which the supplier requires the client to have obtained any import licences, consents, wayleaves and approvals necessary for the purpose of the works. The submission to and approval by the client of such a programme shall not relieve the supplier of any of his duties or responsibilities under the contract;

(c) be deemed to have examined the site if access thereto has been made available to him, and also the conditions of this contract, together with the specifications, schedules, appendices, drawings, and plans, and the supplier shall be responsible for any misunderstanding or incorrect information however obtained except information given in writing by the client, provided that:
if during the execution of the works the supplier shall encounter physical conditions, other than climatic conditions, on the site or artificial obstructions, which conditions or

obstructions could, in his opinion, not have been reasonably foreseen by an experienced supplier, the supplier shall forthwith give written notice thereof to the client and if, in the opinion of the client, such conditions or obstructions could not have been foreseen by an experienced supplier, the client shall pay the additional costs to which the supplier has been put by reason of the said conditions and obstructions.

Example b)

The supplier shall:

(a) before the ..... (date) provide the industrial architect with drawings showing the manner in which the products and additional equipment are to be affixed, together with all information relating to the works required for preparing suitable foundations, for providing suitable access for the products, additional equipment and equipment necessary for the execution of the works to the point or site where they are to be installed or used and for making all the connections necessary to the products and additional equipment. The said drawings and documents will include the specifications necessary to enable the client to purchase the appropriate additional equipment;

(b) submit to the engineer/industrial architect for his approval a programme showing in such form as the industrial architect may reasonably require, the order of procedure in which he proposes to carry out the works including the manufacture, design, delivery to site, erection and commissioning thereof. The programme shall also indicate the times by which the supplier requires the client to have obtained any import licences, consents, wayleaves and approvals necessary for the purpose of the works. The submission to and approval by the engineer/industrial architect of such a programme shall not relieve the supplier of any of his duties or responsibilities under the contract;

(c) be deemed to have examined the site if access thereto has been made available to him, and also the conditions of this contract, together with the specifications, schedules, Appendices, drawings, and plans, and the supplier shall be responsible for any misunderstanding or incorrect information however obtained except information given in writing by the engineer/industrial architect or the client, provided that:

if during the execution of the works the supplier shall encounter physical conditions, other than climatic conditions, on the site or artificial obstructions, which conditions or obstructions could, in his opinion, not have been reasonably foreseen by an experienced supplier, the supplier shall forthwith give written notice thereof to the industrial architect and, if in the opinion of the industrial architect, such conditions or obstructions could not have been reasonably foreseen by an experienced supplier, then the industrial architect shall so certify and the client shall pay the additional costs to which the supplier has been put by reason of the said conditions and obstructions,

including the proper and reasonable cost of complying with any instruction which the industrial architect may issue to the supplier in connection therewith, and of any proper and reasonable measures approved by the industrial architect which the supplier may take in the absence of specific instructions from the industrial architect as a result of such conditions or obstructions being encountered.

17.4.6 Quality

(a) Paragraph 10.1 outlines the means by which the requirement of quality in goods can be dealt with in a contract. The same principles apply to contracts for the supply of plant. In respect of plant, however, an additional means by which the quality of goods and services to be provided can be described is by pre-specifing the results these are to achieve in terms of the quantity and quality of the products to be assembled or manufactured with the production equipment.

(b) Production equipment is only one element in the construction of a factory and it must conform with the other elements involved. Thus it may be necessary to stipulate in the contract that the production equipment will meet the specifications and production standards required of it by other aspects of the construction.

(c) If the supplier is to erect and install plant (e.g. under turnkey or semi-turnkey contracts), both that supplied by him and by third parties, then the warranties of quality must be made to apply not only to the production equipment delivered by the supplier but also to the erection and installation of all the plant.

(d) Where the purchaser has engaged an engineer/industrial architect to supervise and co-ordinate the construction he has the opportunity of double-checking the plant and its installation in so far as the engineer/industrial architect can be given the task of testing and inspecting these. Payment of the purchase price can be made conditional upon the certificate of the architect/engineer indicating the supplier's compliance with the contract. (See also UNCITRAL document A/CN.9/WG.V/WP.13/Add.1 "Scope and Quality of Works".)

(e) The sample clauses given below concerning the testing and inspecting of the goods are more or less similar to those given in Part I, paragraph 11.2 (Inspection and Tests) of these Guidelines.

SAMPLE CLAUSES: Quality

Example a)

1. The client or his representative shall have the right to inspect and/or test the products to confirm their conformity to this contract. The client shall notify the supplier in writing of the inspections and tests the client requires, where they are to be conducted and the identity of any representatives retained for these purposes.

2. The said inspections and/or tests may be carried out on the supplier's premises, the premises on which they are being manufactured and/or on the products' arrival on the site. If part or all of the said products are being manufactured on other premises than those of the supplier, the supplier shall obtain permission for the client to inspect and/or test as if the products or that part thereof were being manufactured on the supplier's premises.

3. Where the said inspections and/or tests are conducted on the premises of their manufacture the supplier shall furnish or obtain the furnishing of all reasonable facilities and assistance, including access to drawings and production data, at no charge to the client.

4. Should any inspected or tested products fail to conform to the specifications the client may reject them and the supplier shall either replace the rejected products or make the alterations necessary to meet the specification requirements free of cost to the client.

5. The client's right to inspect, test and, where necessary, reject the products after the products' arrival in the client's country shall in no way be limited or waived by reason of the products having previously been inspected, tested and passed by the client or his representative prior to the products' shipment from the country of origin.

6. Nothing in this Clause shall in any way release the supplier from any warranted or any other obligations under this contract.

Example b)

1. The engineer/industrial architect shall be entitled during manufacture to inspect, examine and test, on the supplier's premises during working hours, the materials and worksmanship and check the progress of manufacture of all the products to be delivered by the supplier under this contract, and if part of the said products are being manufactured on other premises, the supplier shall obtain for the engineer/industrial architect permission to inspect, examine and test as if the said products or part thereof were being manufactured on the supplier's premises. Such inspection, examination or testing if made shall not release the supplier from any obligation under this contract.

2. The supplier shall agree with the engineer/industrial architect the date and the place at which the products will be ready for testing and unless the engineer/industrial architect shall attend at the place so named on the date agreed the supplier may proceed with the tests, which shall be deemed to have been made in the engineer's/industrial architect's presence, and shall forthwith forward to the industrial architect duly certified copies of the test readings.

4. Where the said inspections, examinations or tests are being carried out on the premises of their manufacture the supplier shall provide or shall obtain the provision of such assistance, labour, materials, electricity, fuel, stores, apparatus and instruments as may be required and as may be reasonably demanded to carry out such inspections, examinations or tests efficiently.

5. As and when the products shall have passed the tests referred to the engineer/industrial architect shall furnish to the supplier a certificate to that effect.

6. If as a result of such inspection, examination or test of the products (other than a test on completion under Clause .. of this contract) the engineer/industrial architect shall decide that such products or part thereof are defective or not in accordance with this contract, he shall notify the supplier accordingly stating in writing his objection and the reason therefor. The supplier shall with all speed make good the defect or ensure that the products comply with this contract. Thereafter, if required by the engineer/industrial architect, the tests shall be repeated under the same terms and conditions save that all reasonable expenses to which the client may be put by the repetition of the tests shall be deducted from the contract price.

Defects apparent before taking over

Example a)

1. Any defects or non-conformity in the works or section thereof becoming apparent before the works are taken over by the client shall be made good by the supplier with all speed and at the supplier's cost. Should the supplier fail to fulfil his obligations under this Clause the client shall be entitled to implement the provisions of Clause .. as though the said defective or non-conforming works or part thereof were the subject of the guarantee.

Example b)

If, in respect of any section or portion of the works not yet taken over, the engineer/industrial architect shall at any time:

(a) decide that any work done or products supplied or materials used by the supplier or any subcontractor is or are defective or fail to comply with the contract, or that such section or portion of the works is defective or does not comply with the contract (all such matters being hereinafter in this Clause called 'defects') and

(b) as soon as reasonably practicable give to the supplier notice in writing of the said decision specifying particulars of the defects alleged and of where the same are alleged to exist or to have occurred, and

(c) so far as may be necessary place the site at the supplier's disposal,

then the supplier shall with all speed and at his own expense, make good the defects so specified. In case the supplier shall fail so to do the client may, provided he does so without undue delay, take, at the cost of the supplier, such steps as may in all the circumstances be reasonable to make good such defects. All products provided by the client to replace defective products shall comply with the contract and shall be obtained at reasonable prices and where reasonably practicable, under competitive conditions. The supplier shall be entitled to remove and retain all products that the client may have replaced at the supplier's cost. Nothing contained in this Clause shall affect any claim by the client under Clause .. (Delay in the Supplier's Performance).

Test on completion

Example a)

1. On completion of the works tests will be carried out to ascertain and investigate the quality of the works, proper performance and operation and their conformity to this contract.

2. The supplier shall notify the client of when the works will be ready for the carrying out of tests on completion and such notification will be given in sufficient time to enable the client to make the necessary arrangements.

3. The tests shall be carried out in the presence of both parties on the date fixed by agreement between the supplier and the client. Should the client fail to attend the said tests or fail to agree a date therefor, the supplier shall carry out the said tests, the works shall be deemed accepted and taken over by the client and the guarantee period shall commence to run on a written notice to the effect being given by the supplier. Save as herein provided no acceptance or taking over will be deemed in the absence of the said tests.

4. The supplier shall provide free of charge all the labour, materials, electricity, fuel, water, stores and apparatus as may be required to carry out such tests efficiently.

5. If, as a result of such tests, the works or any part thereof are found to be defective or not to comply with the contract, the supplier shall, with all speed and at his own expense, make good the defect or ensure that the works comply with the contract and thereafter, if the client so requires, the tests shall be repeated at the cost of the supplier.

6. Should the supplier fail to carry out his obligations under this Clause the client shall be entitled to implement the provisions of Clause .. as though the said defective or non-conforming works or part thereof were the subject matter of the guarantee or, in the alternative, to pay to the supplier only that part of the contract price as reflects the value of the non-defective and conforming works.

7. If by reason of difficulties encountered by the client, whether or not covered by Clause .. (Force Majeure), it becomes impossible to proceed to the taking-over tests, these shall be postponed for a period not exceeding six months, or such other period as the parties agree, and the following provisions shall apply:-

(a) The client shall make payments as if the taking-over had taken place, provided that, in the case of a difficulty due to any of the circumstances falling within Clause .. he shall not, unless otherwise agreed, be required to pay at the due time of taking-over the cost of uncompleted work or, before the expiration of the guarantee period fixed in accordance with subparagraph (d) hereof, any sum retained by way of guarantee.

(b) At the appropriate time, the client shall give notice in writing to the supplier stating the earliest date on which the tests can be carried out and requesting him to fix a new date for the tests. Such new date shall be within ... days after the date mentioned in such notice.

(c) The supplier may, at the cost of the client examine the works before making the tests and make good any defect or deterioration therein that may have developed, or loss thereof that may have occurred, after the date when the works were first ready for testing in accordance with the contract.

(d) The guarantee period shall run from the date when the postponed tests have been successfully carried out.

(e) If the client so requires, the supplier shall, subject to the provisions of the contract in respect of the passing of risk, protect and preserve the works until the tests are carried out or for one month from the time when the works were first ready for testing in accordance with the contract, whichever is the shorter period. The supplier shall be entitled to recover from the client the cost of any measures actually taken by the supplier to protect and preserve the works. Unless otherwise agreed, the liability of the supplier for protecting and preserving the works shall cease on the expiry of such month.

(f) If at the end of six months or such other period as the parties may have agreed the tests have not taken place the client will be deemed to have accepted and taken over the works unless the provisions of Clause .. (Force Majeure) are applicable.

Example b)

2. The supplier shall give the engineer/industrial architect, with a copy to the client, 21 days' notice in writing of the date after which he will be ready to make the tests on completion. Unless otherwise agreed the tests shall take place within 10 days after the said date on such day or days as the engineer/industrial architect shall notify the supplier in writing.

3. (a) If the engineer/industrial architect fails to appoint a time after having been asked so to do or to attend at any time or place duly appointed for making the said tests the supplier shall be entitled to proceed in his absence and the said tests shall be deemed to have been made in the presence of the industrial architect and the results of the tests shall be accepted as accurate.

(b) If in the opinion of the engineer/industrial architect the tests are being unduly delayed he may by notice in writing, call upon the supplier to make such tests within 21 days from the receipt of the said notice, and the supplier shall make the said tests on such days within the said 21 days as the supplier may fix and of which he shall give notice to the engineer/industrial architect. If the supplier fails to make such tests within the time aforesaid the engineer/industrial architect may himself proceed to make the tests. All tests so made by the engineer/industrial architect shall be at the risk and expense of the supplier unless the suppler shall establish that the tests were not being unduly delayed in which case tests so made shall be at the risk and expense of the client.

4. The client, except where otherwise specified, shall provide free of charge subject to the provisions of subparagraph 5 of this Clause such labour, materials, electricity, fuel, water, stores and apparatus as may be requisite and as may be reasonably demanded to carry out such tests efficiently.

5. If any portion of the works fails to pass the tests, tests of the said portion shall, if required by the engineer/industrial architect or by the supplier, be repeated within a reasonable time upon the same terms and conditions, save that all reasonable expenses to which the client may be put by the repetition of the tests shall be deducted from the contract price.

6. If the works or any section thereof shall fail to pass the tests on the repetion thereof under subparagraph 5 of this Caluse the engineer/industrial architect shall be entitled:

(a) to order a further repetition of the tests under the conditions of subparagraph 5; or

(b) to reject the works or section thereof if the results of the tests show that the works or the section fail to meet the specifications or do not conform with this contract and to implement the provisions of Clause .. as though the said defects or failure to conform were defects under that Clause; or

(c) to issue a taking-over certificate, if the client so wishes, subject to such reduction of the contract price as is reasonable having regard to the cost of remedying the same and the additional loss and expense which will be suffered by the client.

Take-over

Example a)

1. As soon as the works have been completed in accordance with this contract and have passed all the taking-over tests to be made on completion without any defect for which the supplier is

responsible having been found, the client and the supplier shall draw up and sign a certificate of completion of the works (hereinafter called a "taking-over certificate") in which the date the work was completed and passed the tests will be specified.

2. Save as is otherwise provided in this contract, the works will be deemed accepted and taken-over by the client on the fulfillment of the conditions required for a taking-over certificate and the guarantee period shall thereupon commence.

Example b)

1. As soon as the works have been completed in accordance with the contract (except in minor respects that do not affect their use for the purpose for which they are intended and save for the obligations of the supplier under Clause .. (Guarantee) and have passed the tests on completion, the engineer/industrial architect shall issue a certificate to the supplier, with a copy to the client (herein called a 'taking-over certificate'), in which he shall certify the date on which the works have been so completed and have passed the said tests, and the client shall be deemed to have taken over the works on the date so certified whereupon title to and risk of loss or damage to the works or any section or portion thereof shall, subject to the provisions of Clause .. (Liability for Accidents and Damage) and Clause .. (Guarantee) pass to the client but the issue of a taking-over certificate shall not operate as an admission that the works have been completed in every respect. In the event of the works being divided by the contract into two or more sections the client shall be entitled to take over any section or sections before the other or others, and thereupon the engineer/industrial architect shall issue a taking-over certificate in respect thereof. Save as provided in subparagraph 3 of this Clause the client shall not use the works or any section or portion thereof until a taking-over certificate has been issued in respect thereof. If, nevertheless, the client does so use the works or any section or portion thereof, the works or section or portion shall be deemed to have been taken over.

2. If by agreement between the client, the engineer/industrial architect and the supplier any portion of the works (other than a section or sections) shall be taken over before the remainder of the works the engineer/industrial architect shall issue a taking-over certificate in respect of that portion.

3. If, by reason of any default on the part of the supplier a taking-over certificate has not been issued in respect of every portion of the works within one month after the time for completion the client shall be at liberty to use the works or any section or portion thereof in respect of which a taking-over certificate has not been issued if and so long as the works or the portion so used as aforesaid shall be reasonably capable of being used provided that the supplier shall be afforded the earliest possible opportunity of taking such steps as may be necessary to permit the issue of the taking-over certificate.

4. If, by reason of any act or omission of the client or the engineer/industrial architect or of some other contractor employed by the client, the supplier shall be prevented from carrying out the tests on completion then, unless in the meantime the works shall have been proved not to be substantially in accordance with the contract, the client shall be deemed to have taken over the works and the engineer/industrial architect shall issue a taking-over certificate accordingly. The supplier shall nevertheless make the said tests during the guarantee period as and when required by the engineer/industrial architect by .. days' notice in writing and Clause .. subparagraphs 3, 4, 5 and 6 (Tests on Completion) shall apply. Any additional expense to which the supplier may be put in making the said tests during the guarantee period pursuant to this subparagraph shall be included in the contract price, and such allowances shall be made from the performances required to be attained in the said tests as may be reasonable having regard to any use of the works by the client prior to the tests.

17.4.7 Variations, changes and additions to the scope of the contract

In international contracts concerning the delivery of production lines or complete plants, the purchaser shall have full powers, subject to this article and other provisions of the contract during the execution of the contract to alter, amend, omit, change, modify, add to or otherwise vary any of the work under the contract and the contractor shall carry out such work, so far as applicable as though the said variations were stated in the contract. The contractor may also be entitled to suggest variations asking the written consent of the client. Sample clauses are given below.

SAMPLE CLAUSES: Variations

Example a)

1. The supplier shall not alter, amend, omit, add to or otherwise vary any of the works without the written consent or direction of the client.

2. In any case in which the supplier is of the opinion that an alteration, amendment, omission, addition to or other variation of the works, whether desired by the supplier or by the client, will involve an addition to or deduction from the contract price or a delay in the supplier's performance, the supplier shall, as soon as possible, before proceeding therewith, advise the client in writing to that effect. The sum to be added or deducted from the contract and/or the delay in the supplier's performance shall be ascertained and the supplier will not carry out the said alteration, amendment, omission, addition to or other variation without the express written consent of the client to the alteration in the contract price and/or the date for completion of the works.

3. Any such alteration, amendment, omission, addition to or other variation carried out by the supplier shall be subject to the same conditions, so far as applicable, as though the said variations were stated in the specifications.

4. This Clause shall apply in respect of a variation in the products to be delivered only in so far as Clause .. hereof does not so apply.

Example b)

1. The supplier shall not alter any of the works except as directed in writing by the engineer/industrial architect. The engineer/industrial architect shall have full power, subject to the provisions hereinafter contained, from time to time during the execution of the contract by notice in writing to direct the supplier to alter, amend, omit, add to or otherwise vary any of the works. The supplier shall carry out such variations and be bound by the same conditions, so far as applicable, as though the said variations were stated in the specifications. Provided that no such variation shall, except with the consent in writing of the supplier and the client, be such as will, with any variations already directed to be made, involve a net addition to or deduction from the contract price of more than 15 per cent thereof. In any case in which the supplier has received any direction from the engineer/industrial architect which either then or later will, in the opinion of the supplier, involve an addition to or deduction of the contract price the supplier shall as soon as reasonably possible and, where practicable, before proceeding therewith, advise the engineer/industrial architect in writing to that effect. The amount to be added to or deducted from the contract price shall be ascertained and shall be such sum as is reasonable in the circumstances (or, shall be determined in accordance with the rates specified in Appendix ..). Due account shall be taken of any partial execution of the works which is rendered useless by any such variation.

2. If the engineer/industrial architect shall make any variation in any part of the works such reasonable notice in writing shall be given to the supplier as will enable him to make his arrangements accordingly. In cases where products already manufactured or in the course of manufacture, or any work done or drawings or patterns made require to be altered, a reasonable sum in respect thereof shall be allowed by the engineer/industrial architect. If, in the opinion of the supplier, any variation is likely to prevent or prejudice the supplier from or in fulfilling any of his obligations under the contract, he shall notify the engineer/industrial architect thereof in writing and the engineer/industrial architect shall decide forthwith whether or not the same shall be carried out. If the engineer/industrial architect confirms his instructions in writing the said obligations shall be modified to such an extent as may be justified. Until the engineer/industrial architect so confirms his instructions they shall be deemed not to have been given.

3. On receipt of the engineer's/industrial architect's confirmation of instructions in respect of any variation the supplier shall immediately proceed to carry out such instructions unless the supplier has notified the engineer/industrial architect that in his opinion the variation will involve a net addition to or deduction from the contract of more than 15 per cent. The work shall not, without the consent of the engineer/industrial architect, be delayed pending agreement on price (such consent not to be unreasonably withheld).

4. The supplier shall send to the engineer/industrial architect once in every month, an account giving particulars (as full and detailed as possible) of all claims for any additional payment to which the supplier may consider himself entitled and of all extra or additional work ordered by the engineer/industrial architect which he has executed during the preceding month. No claim for payment (interim or final) will be considered unless included in such account.

5. If, with the consent in writing of the supplier and the client the total value of all variations ordered under the provisions of this Clause exceeds 15 per cent of the total contract price, the contract price shall be amended by such sum as shall be agreed upon between the engineer/industrial architect and the supplier. In the event of disagreement the engineer/industrial architect shall fix such sum as shall in his opinion be reasonable and proper, having regard to all material and relevant factors including the supplier's costs and overheads.

17.4.8 Price and payment conditions

The contract price will usually be divided into a lump-sum and a cost-reimbursable part in such types of contract. The following sample clauses show some of the most common clauses.

SAMPLE CLAUSES: Contract Price

Example a)

1. The client shall pay the supplier the total sum of ..... in consideration of the carrying-out of all the works by the supplier.

2. The said total sum of ..... will be divided into the instalments specified in Annex .. for each portion of the works. Once each portion of the works specified in the said Annex is completed the supplier shall submit an invoice therefor specifying and describing the portion of the works so completed and the client shall pay the supplier the instalment relative to such a completed portion of the works within .. days of receipt of the said invoice.

3. The said payments of the instalments for each completed portion of the works are conditional upon the fulfillment by the supplier of his obligations in respect of each such part and no payment of an instalment shall be due until the supplier has fulfilled his obligations in respect thereof unless the failure of the supplier to fulfil his obligations is due to an act or omission of the client.

4. If the client delays in making any payment the supplier may postpone the fulfillment of his own obligations until such payment is made, unless the failure of the client is due to an act or omission of the supplier.

5. If the client's delay in making payment is due to one of the circumstances mentioned in Clause .. (Force Majeure), the supplier shall not be entitled to any interest on the sum due.

6. Save as aforesaid, if the client delays in making any payment, the supplier shall, on giving to the client within a reasonable time notice in writing, be entitled to the payment of interest on the sum due at the rate of ... per cent per .... from the date upon which such sum became due. If, within ... months of the date upon which the said payment became due the client has not paid the said sum, the supplier shall be entitled by notice in writing to the client to terminate the contract and thereupon to recover from the client the amount of his loss up to the sum specified in Appendix .. of this contract.

7. The total contract price of ..... includes all the following items:-

(a) all travelling expenses incurred by the supplier in respect of his employees and the transport of their equipment and personal effects (within reasonable limits);

(b) the living expenses, including any appropriate allowances, of the supplier's employees for each day's absence from their country, including non-working days and holidays;

(c) the time worked by the supplier and his employees, including time worked by way of overtime;

(d) the use of the equipment to be provided by the supplier under this contract, including the wear and tear and depreciation of the said equipment and the supplier's tools;

(e) time necessarily spent on:

(i) preparation and formalities incidental to the outward and homeward journeys;

(ii) the outward and homeward journeys;

(iii) daily travel morning and evenings between logdings and the site;

(f) any expenses incurred by the supplier in accordance with this contract, in connection with the provision of equipment by him, including the use thereof;

(g) any taxes or dues levied on the invoices and payable by the supplier in the client's country.

8. Notwithstanding anything contained in subparagraph 7 of this Clause if the carrying-out of the works is prolonged for any cause for which the client or any of his contractors other than the supplier is responsible and if, as a result the work of the supplier is suspended or added to, a charge will be made for any idle time, extra work, any living expenses of the supplier's employees and the cost of any extra journey.

Example b)

1. The works shall be carried out by the supplier on a cost-reimbursable basis. The client shall reimburse the supplier the costs and expenses of the works specified in Appendix .. according to the price schedule detailed in the said Appendix. The client will, in additon to the said costs and expenses, pay to the supplier a sum equal to .. per cent of the total costs and expenses of the works.

2. Payment of the said costs and expenses shall be made on foot of certificates issued by the engineer/industrial architect as hereinafter set out. Payment of the additional sum equal to .. per cent of the total of the costs and expenses of the works shall be made as follows:

In addition to the payment of the costs and expenses certified by the engineer/industrial architect in the manner described hereafter, the client shall pay to the supplier a sum equal to .. per cent of the costs and expenses so certified and the said additional sum shall, for the purposes of this clause, be treated as though it were a sum certified by the engineer/industrial architect.

3. The supplier may at the times and in the manner following apply for interim and final certificates as referred to in subparagraph .. hereof for products shipped and en route to the site and for work executed on the site.

4. Applications for interim certificates may be made to the engineer/industrial architect in respect of each shipment of products and from time to time as work on the site progresses. Each such application in respect of shipment shall identify the products shipped, state the amount claimed and be accompanied by such evidence of shipment and of payment of freight and insurance and such other documents as the engineer/industrial architect may reasonably require. Each other such application shall state the amount claimed and shall set forth in detail, in the order of the schedule of prices, particulars of the work executed on the site and of the products delivered to the site pursuant to the contract to a date named in the application and since the period covered by the last preceding certificate, if any, which includes work on site.

5. The engineer/industrial architect shall issue to the supplier an interim certificate within 14 days after receiving an application therefor in accordance with subparagraph 4 of this Clause which the supplier was entitled to make. If the engineer/industrial architect

shall fail to issue an interim certificate as provided in this Clause the supplier shall be entitled to exercise the remedies provided in subparagraphs 16 and 17 hereof.

6. Every interim certificate shall certify the total value of products shipped or, as the case may be, of the work duly executed on the site and of the equipment delivered to the site for use in the works pursuant to the contract up to the date named in the application for the certificate, less the total of any sums previously certified in interim certificates, provided that no sum shall be included in any interim certificate in respect of any works that according to the decision of the engineer/industrial architect do not comply with the contract, or have been brought, and are at the date of the certificate, prematurely upon the site.

7. An interim certificate shall not be withheld on account of defects of a minor character which are not such as to affect the use of the works or of any portion thereof.

8. No interim certificate shall be relied upon as conclusive evidence of any matter stated therein nor affect or prejudice any right of the client or the supplier against the other.

9. Application for the final certificate may be made to the engineer/industrial architect after the supplier has ceased to be under any obligation under Clause .. (Guarantee) provided that, if a taking-over certificate has been issued in respect of any section or portion of the works, the supplier may apply for a separate final certificate at any time after the said obligation has ceased in relation to such section or portion. Where the supplier has carried out replacements or renewals to the works in compliance with Clause .. (Guarantee) the supplier's obligations shall continue as provided in Clause .. (Guarantee) but the right of the supplier to apply for a final certificate other than for the replacements or renewals shall not be affected by that fact, and after the supplier has ceased to be under any obligation under Clause .. (Guarantee) in respect of the replacements or renewals he may apply for a final certificate in respect thereof.

10. The engineer/industrial architect shall issue to the supplier a final certificate within .. days after receiving an application therefor which the supplier was entitled to make.

11. A final certificate shall certify the total of all amounts comprised in interim certificates previously issued in respect of the works or the section or portion thereof to which the final certificate relates subject to such additions thereto or deductions therefrom as may be authorized under subparagraph 13 hereof.

12. A final certificate shall, save in the case of fraud or dishonesty relating to or affecting any matter dealt with in the certificate, be conclusive evidence as to the sufficiency of the works and of the value thereof unless any proceedings arising out of the contract whether under Clause .. (Settlement of Disputes) or otherwise shall have been commenced by either party before the final certificate has been issued or within three months thereafter.

13. If any sum shall become payable to the supplier under the contract otherwise than for work executed or products delivered the amount thereof shall be included in the next certificate (interim or final) issued by the engineer/industrial architect and if any sum shall become payable under the contract by the supplier to the client, prior to the issue of the final certificate, whether by deduction from the contract price or otherwise, the amount thereof shall be deducted in the next certificate.

14. The engineer/industrial architect may in any certificate give effect to any correction or modification that should properly be made in respect of any previous certificate.

15. Unless otherwise agreed the client shall pay to the supplier in the following manner the contract price adjusted to give effect to such additions thereto and such deductions therefrom as are provided in this contract:-

(a) within ... weeks/months from the issue of each interim certificate a sum equal to 90 per cent of the sum certified therein;

(b) 95 per cent of the contract price adjusted as aforesaid within ... weeks/months from the date certified in the taking-over certificate;

(c) the balance of the contract price adjusted as aforesaid within one month after the issue of the final certificate. Provided that if the supplier shall have furnished to the client a guarantee acceptable to the client for the repayment of such balance he shall be entitled to payment thereof with or at any time after the payment provided by subparagraph (b) hereof.

If any section or portion of the works shall be taken over separately the payments herein provided for on or after taking over shall be made in respect of the section or portion taken over, and references to the contract price shall mean such part of the contract price as shall in the absence of agreement be apportioned thereto by the engineer/industrial architect.

In determining the amount of any payment under this Clause in respect of any portion of the works due account shall be taken of all payments previously made in respect of the same portion whether under this Clause or otherwise.

16. If the period for payment of any sum payable under this Clause shall be exceeded, the supplier shall be entitled without prejudice to any other right or remedy, without formal notice, to receive interest calculated at the rate or rates which the supplier's bank, named in Appendix .. hereof, would have charged the supplier to borrow the amount of the delayed payment during the period of delay. If the delay exceeds ... days such rate of interest shall be increased by the amount stated in Appendix .. of this contract.

17. If the engineer/industrial architect fails to issue an interim certificate in accordance with this Clause or if the client fails to make any payment as provided in this Clause, the supplier shall be entitled to stop the works, after giving 14 days' notice in writing to the client and the engineer/industrial architect of his intention so to do, until the said certificate be issued or payment be made as

the case may be, in which case the expenses of the supplier occasioned by the stoppage and the subsequent resumption of work shall be included in the contract price.

18. In the case of the engineer/industrial architect's failure to issue an interim certificate, the supplier shall be entitled after giving to the client and the engineer/industrial architect one month's notice of his intention so to do, to terminate the contract whether or not the supplier has stopped the works or given notice of his intention so to do pursuant to subparagraph 17 hereof.

17.4.9 Delay in performance

The remarks made in paragraph .. and paragraph .. apply to the supply of production equipment. (See also UNICTRAL document A/CN.9/WG.V/WP.11/Add 3. "Failure to Perform" and A/CN.9/WG.V/WP.7/Add.3 "Maintenance and Spare Parts.)

17.4.10 After sales service

The comments made under paragraph 11 apply. The purchaser (client) shall take care to get a contractual commitment from the contractor under which the contractor shall supply all the spare parts which are necessary for the smooth operation of the plant during a period of .. years, and replenish the stock of spare parts at the end of the guarantee period.

17.4.11 Management and training

17.4.11.1 The contract shall contain optional paragraphs for managerial and advisory services of the contractor after the take-over of the plant. The related conditions may be agreed upon the initial contract or on a later date, but the contractor shall be committed, if the client so requires, to fulfil such a commitment. For guidelines for special management contracts please refer to paragraph 17.5.

17.4.11.2 The contract shall contain specified clauses for the training of the staff of the client. The training may take place in any of the contractor's factories and/or in that of the know-how transferor.

17.4.12 Miscellaneous obligations of the contractor

International contracts related to the supply of production lines or plants contain quite a lot of further stipulations beyond those mentioned so far. It would exceed the admitted extent of these Guidelines if all relevant clauses and related explanations were to be set out and pressed into this volume. However, for general information, a short list of some of the provisions which form part of these contracts is given below.

17.4.12.1 Detailed enumeration of drawings, plans, designs which have to be approved by the client.

17.4.12.2 Detailed specification of equipment to be delivered by the contractor.

17.4.12.3 Additional equipment to be procured by the client, specified by the contractor.

17.4.12.4 Specification of installation equipment to be procured by the client and specified by the contractor.

17.4.12.5 Detailed enumeration of the expatriates of the contractor for the execution, supervision of the work from the beginning to final acceptance (take-over) of the plant.

17.4.12.6 Detailed list of the staff of the client specified by the contractor.

17.4.12.7 Performance security to be issued by the contractor's first class bank.

17.4.12.8 Penalties or liquidated damages for delayed delivery, non-observance of guaranteed values (admitted tolerances).

17.4.12.9 Insurance.

17.4.12.10 Delivery dates, time-table to be respected by the contractor under contractual sanctions.

17.4.12.11 Force Majeure.

17.4.12.12 Interruption, suspension of work.

17.4.12.13 Client's failure to perform.

17.4.12.14 Contractor's gross negligence and consequences.

17.4.12.15 Guaranteed values and tolerances.

17.4.12.16 Warranties.

17.4.12.17 Liability of the contractor for personal injury and damage to property.

17.4.12.18 Intellectual property rights; secrecy.

etc.

17.5 Contract for the initial management of works for the assembly or manufacture of agricultural machinery

17.5.1 Scope of services

(a) The tasks involved in organizing and putting into operation industrial works are numerous and varied; they include the establishment of management systems, the organization of procurement and supply, the putting into operation of stock management procedures, the organization of production itself, the planning of personnel requirements and the latter's training, the drawing of instructions and operation procedures and the planning and carrying out of experiments to achieve the optimal use of the production equipment. The more skillfully the initial management is carried out, the more efficient will be the later operation of the factory.

(b) Purchasers who lack experience often engage an operations manager, be he the supplier of the plant, the industrial engineer, the licensor or some other person, to assist in the initial operation of the works. The operations manager can be engaged to advise and instruct the purchaser and his employees in the running of the works only, leaving the purchaser with direct responsibility for their operation. Alternatively, the operations manager's function can be to take complete responsibility for the management of the factory for a specified period followed by a phased transfer of responsibility to the purchaser. Whichever division of responsibilities is chosen - whether the operations manager is to be directly or indirectly answerable for the operation of the factory - this must be specified in the contract.

(c) It is beyond the scope of these Guidelines to describe the services offered by operations managers (the reader should consult ECE document "Guide on Drawing-up International Contracts for Services Relating to Maintenance, Repair and Operation of Industrial and Other Works" Trade/GE. 1/R.32 for a description of these). Suffice it to say that these range from actual technical management to technical assistance and training. The purchaser, in the light of the skill and experience available to him, can choose to employ an operations manager to provide technical management with direct responsibility in those areas in which the purchaser has no expertise, to render technical assistance (leaving the purchaser with direct responsibility) in those sectors of works management in which the purchaser has some experience and/or to provide the training of the purchaser's employees in certain or all technical and managerial matters.

(d) Due to its extraordinary importance it has to be stressed that this contract must contain detailed provisions for the training of the client's staff. If the client concludes a turnkey or semi-turnkey contract with one contractor, the contractual lump-sum price shall include the extensive training of the client's staff.

(e) The client should take care of an appropriate contractual provision concerning the termination of the contract in cases where the contractor fails to fulfil his commitments under the contrat and/or the client, for whatever reasons, would decline to co-operate in that kind of contract with the contractor.

(f) The contract may also contain, if the client so desires, appropriate provisions for assistance by the contractor in the marketing and technical development of the plant.

17.5.2 Transfer of Responsibility

Where the operations manager is directly responsible for the operation of the factory or any aspect of its management, that is to say, where the operations manager is supplying technical management, it is essential that the contract specify the method and time scale by which the operations manager's responsibilities are to be transferred to the purchaser. In this regard, particular attention must be paid to the phasing of the training to be provided so as to ensure that the purchaser and his employees are adequately instructed when they come to take over the operation of the factory.

17.5.3 Information

(a) The purpose in engaging an operations manager is not only to have him exercise his skill and experience in the initial management of the works but also to obtain from him the information necessary to enable the purchaser to manage the factory and to operate it efficiently. That information should, of course, pass to the purchaser and his employees in the course of the initial management to ensure that the purchaser will be able to carry on the operation of the works once he becomes responsible for it.

(b) To ensure the transfer of the information the purchaser should consider the inclusion of different studies on the topic of productivity, technical development, plant organization etc., within a certain time limit. Such studies could, inter alia, describe the optimal managerial, administrative and financial systems to be employed, provide a detailed study

of the production capacity of the works and how this can be maximized, set out the methods of achieving and maintaining quality, detail the possible modifications to be made to the products manufactured, make recommendations about the recruitment and training of personnel and advise on the means of enlarging and developing the operation.

17.5.4 Standards (Quality)

(a) The remarks made in the corresponding paragraphs apply here, too.

(b) Quality, however, can also be defined in terms of the result. An operations management contract sometimes requires the supplier of those services to carry out his obligations in such a manner as will achieve a certain rate of productivity in the works. Where such a provision is included in the contract the operations manager usually requires an opportunity to review the design and construction plans of the factory. Accordingly, if the purchaser wishes to include a provision in his contract with the operations manager requiring the achievement of a specified production level, he should negotiate the latter contract sufficiently early to allow the operations manager to be involved in the design and construction plan of the factory. Adequate provision shall be included in the contract which warns the contractor against possible termination of the contract by the client if the international standards are not applied or the contractor is reluctant to render them.

17.5.5 Personnel

(a) The contract should specify the staff which the operations manager is to provide to carry out his obligations under the contract.

(b) If the operations manager is engaged in the training of the purchaser's employees, then the various categories of the purchaser's staff to receive instruction should be specified in the contract.

(c) Depending on whether the operations manager is to act in an advisory capacity or is to be directly responsible for the operation of the works, he will need to have more or less authority over the purchaser's employees. The contract should make clear the limits of the operations manager's right to direct the purchaser's staff.

(d) The contract shall contain, however, a provision which entitles the client to ask the contractor for replacement of his staff if the client finds it necessary.

17.5.6 Price and payment

Usually the same methods apply as decribed in the paragraphs dealing with the price calculations for the engineer/industrial architect.

SUMMARY

The Guidelines do not specify, for reasons of saving space, some of the usual clauses, like recitals, definitions, entry into force of the contract, bank guarantees, description of arbitration courts, etc. It is believed, however, that interested purchasers examine such clauses in the relevant UNIDO publications where they are specified exhaustively.

UNIDO strongly recommends the readers to examine and study carefully the related United Nations publications, like those of UNCITRAL, UNCTAD, UNIDO, etc. Some other sources also merit to be referred to, like FIDIC, Incoterms, etc.